Supreme Court, U.S.
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In The

Supreme Court of the United States

RONEN JACK AMIR,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment's prohibition against general exploratory search warrants is violated when peace officers bring a drug-detecting dog to participate in a search when drugs are not among the items specified for seizure in the search warrant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
PRESERVATION OF THE FEDERAL QUESTION BELOW	5
REASONS FOR GRANTING THE PETITION	6
A. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS BANNING GENERAL EXPLORATORY SEARCHES	6
B. THE DECISION BELOW RESOLVES AN IMPORTANT FEDERAL QUESTION UNRESOLVED BY THIS COURT IN *UNITED STATES V. PLACE* AND CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *UNITED STATES V. THOMAS*	12
C. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *KYLLO V. UNITED STATES*	19
D. THE DECISION BELOW FAILS TO HONOR THIS COURT'S DECISIONS IN *UNITED STATES V. ROSS* AND *COOLIDGE V. NEW HAMPSHIRE*	23
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES:

Amir v. State, 45 S.W.3d 88 (Tex.Crim.App. 2001)..... 4

Amir v. State, ___ S.W.3d ___ (Tex.Crim.App. No. 287-02) (not yet reported) 1, 5, 22, 25

Amir v. State, No. 01-99-640-CR (2-24-00) (not reported)..... 3

Amir v. State, No. 01-99-640-CR (1-17-02) (not reported) (op. on remand) 4

Beck v. Ohio, 379 U.S. 89 (1964).....10

Brock v. United States, 223 F.2d 681 (5th Cir. 1955).....21

City of Indianapolis v. Edmond, 531 U.S. 32 (2000).....12, 13, 14, 15

Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987)..13, 22

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....6, 23, 24, 25, 26

Horton v. California, 496 U.S. 128 (1990) 10, 11, 12

Johnson v. United States, 333 U.S. 10 (1948).....8, 12

Katz v. United States, 389 U.S. 347 (1967).....9, 10, 12, 16

Kyllo v. United States, 533 U.S. 27 (2001).....*passim*

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)....5, 6, 12

Maryland v. Garrison, 480 U.S. 79 (1987).....8, 10, 12, 24

Minnesota v. Carter, 525 U.S. 83 (1998).....15

Minnesota v. Dickerson, 508 U.S. 366 (1993)..... 8

Payton v. New York, 445 U.S. 573 (1980).....6, 15, 18

Richards v. Wisconsin, 520 U.S. 385 (1997) 11

Stanford v. Texas, 379 U.S. 476 (1965).....5, 6, 7, 9, 12

TABLE OF AUTHORITIES – Continued

Page

Terry v. Ohio, 392 U.S. 1 (1968) 14

United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) 17, 18

United States v. Garcia, 42 F.3d 604 (10th Cir 1994) 17

United States v. Jacobson, 466 U.S. 109 (1983) 12

United States v. Karo, 468 U.S. 705 (1984) 15, 22

United States v. Ligenfelter, 997 F.2d 632 (9th Cir. 1993) 18

United States v. Place, 462 U.S. 696 (1983) 12, 13, 14, 15

United States v. Reed, 141 F.3d 644 (6th Cir. 1998) 18

United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) 18

United States v. Ross, 456 U.S. 798 (1982) 23, 24, 25, 26

United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985) 16, 17, 18, 19, 20

Wilson v. Arkansas, 514 U.S. 385 (1995) 11

Wilson v. Layne, 526 U.S. 603 (1999) 8, 10, 11, 12

Wong Sun v. United States, 371 U.S. 471 (1963) 9

UNITED STATES CONSTITUTION:

AMEND. IV ..... *passim*

AMEND. XIV 2

STATUTES:

28 U.S.C. Sec. 1257 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ronen Jack Amir, respectfully prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Appeals for the First Judicial District entered on January 17, 2002.

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the First Judicial District affirming Petitioner's conviction is not reported and appears at *Pet. App.* 1-10. The order of the Texas Court of Criminal Appeals denying discretionary review and the opinion dissenting to the denial of discretionary review is reported at ___ S.W.3d ___ and appears at *Pet. App.* 11-16.

JURISDICTION

The Texas Court of Appeals for the First Judicial District affirmed Petitioner's conviction on direct appeal on January 17, 2002. The Texas Court of Criminal Appeals, with three judges dissenting, denied discretionary review on September 18, 2002. This petition is filed within 90 days of the latter date.

This Court's jurisdiction is based upon 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that, "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part that, "No State shall . . . deprive any person of liberty . . . without due process of law."

STATEMENT OF THE CASE

1. On June 29, 1998, City of Houston police officers executed a search warrant[1] authorizing the search and seizure of counterfeit jeans and business records from U.S. Apparel at 5627 Star Lane.[2] Officers executing this warrant searched the entire premises, including Petitioner's bedroom, with the assistance of a drug-sniffing dog not trained to alert upon counterfeit jeans or business records.

[1] A copy of the search warrant and supporting affidavit appear at *Pet. App.* 32-37.

[2] The warrant commanded police to search U.S. Apparel, located at 5627 Star Lane, Suite A, Harris County, Texas, "with the authority to search for and to seize any and all items which are more particularly described in the attached affidavit that may be found therein including, but not limited to counterfeit Levi Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel . . . and any computer equipment used in the operation of U.S. Apparel." *Pet. App.* at 32.

The dog alerted on a night stand inside Petitioner's bedroom from which officers recovered cocaine.[3]

2. After Petitioner was indicted for possession of a controlled substance, he moved to suppress the cocaine seized, claiming that the search violated the Fourth Amendment to the United States Constitution. At the suppression hearing, the dog's handler admitted that his dog was not trained to alert on counterfeit jeans or business records, the two objects of the search warrant. When asked by the trial judge why the dog was even present if the warrant did not specify drugs as one of its objects, the handler replied, "*I have no idea, Your Honor.*" *Pet. App.* at 8. The trial judge amplified his concern prior to announcing his ruling when he remarked, "[W]hat are they doing with a dog in there. That does concern me." *Pet. App.* at 8. The trial judge, however, denied the motion to suppress, and pursuant to a plea agreement, Petitioner was placed on eight years probation.[4]

3. On direct appeal, the Texas Court of Appeals for the First Judicial District reversed this conviction because the search of Petitioner's premises exceeded the scope of the search warrant. *Amir v. State*, No. 01-99-640-CR (delivered 2-24-00) (*not designated for publication*). *Pet. App.* at

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[3] The dog also alerted on a safe inside Petitioner's bedroom which was eventually opened over Petitioner's objection and from which cocaine was also recovered. As the court of appeals noted, this record is silent as to what quantity of cocaine was recovered from what location other than that a total of 16.22 grams of cocaine were recovered as reflected in the search warrant return.

[4] As part of the plea agreement, Petitioner was permitted to appeal the denial of his motion to suppress. *Pet. App.* at 1; 17; 25.

17-24. The Texas Court of Criminal Appeals reversed the judgment and remanded the cause to the court of appeals after holding that the search of Petitioner's bedroom did not exceed the scope of the warrant authorizing the search of his business. *Amir v. State*, 45 S.W.3d 88, 91 (Tex.Crim.App. 2001). *Pet. App.* at 25-31.

4. On remand, the court of appeals affirmed Petitioner's conviction, holding that the dog's presence did not exceed the scope of the warrant even though no evidence of probable cause to search for drugs had been presented to or found by the issuing magistrate because officers could have reasonably believed that business records named in the warrant could be found inside the night stand in Petitioner's bedroom. *Amir v. State*, No. 01-99-640-CR, *slip op.* at 9-10 (delivered 1-17-02) (*not designated for publication*). *Pet. App.* at 1-10.

5. The Texas Court of Criminal Appeals denied discretionary review over the dissent of three judges, one of whom wrote that the court of appeals:

> [D]oes not adequately address [Petitioner's] arguments because it never answers the fundamental question of the case: *why was a drug-sniffing dog used in a search for a company's counterfeit clothing and business records*?
>
> * * *
>
> Any search performed or assisted by the dog was, by definition, a search for drugs, as the dog had no other training. *Any search for drugs was a search for something outside the scope of the warrant.* The Court of Appeals limited its decision to the legitimacy of the search without considering the impact of the drug-sniffing dog's presence. I think that the opinion thereby decides

> an important question of state and federal law that should be addressed by this Court. There are crucial public policy implications in legitimizing the unusual warrant execution techniques utilized in [this] case. Bringing along technology or animals that will ferret out *only* items not named in a warrant, based on the likelihood that the items found will coincide with the possible location of the items that *are* specified in the warrant, is not a practice that should become routine.

Amir v. State, ___ S.W.3d at ___; *slip op.* at 4-6 (Meyers, J., *dissenting*) (initial emphasis added) (footnote omitted). *Pet. App.* at 11-16.

PRESERVATION OF THE FEDERAL QUESTION BELOW

Petitioner timely raised the question of whether the search at issue violated the Fourth Amendment to the United States Constitution in his written pre-trial motion to suppress. *Pet. App.* at 4, n. 3. On original submission, the court of appeals expressly held that the search violated the Fourth Amendment to the United States Constitution, *Pet. App.* at 19, n. 2, and on remand, expressly found it did not. *Pet. App.* at 4, n. 3. Petitioner relied on the Fourth Amendment and this Court's decisions in *Stanford v. Texas*, 379 U.S. 476 (1965), *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), and *Kyllo v. United States*, 533 U.S. 27 (2001), in seeking review of the court of appeals' decision before the Court of Criminal Appeals.

REASONS FOR GRANTING THE PETITION

A. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS BANNING GENERAL EXPLORATORY SEARCHES

1. The Dog's Presence Exceeded the Scope of the Search Warrant

The Fourth Amendment provides that "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It is part and parcel of our heritage that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 584 (1980). This Court has recounted how such general warrants were denounced as "the worst instrument of arbitrary power, the most destructive of English liberty, and the most fundamental principles of law because they placed 'the liberty of every man in the hands of every petty officer.'" *Stanford v. Texas*, 379 U.S. 476, 481 (1965). See also *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) ("This search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect."); *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (*plurality opinion*) ("[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not of intrusion per se, but of a general, exploratory rummaging in a person's belongings. The warrant accomplishes this second

objective by requiring a 'particular description' of the things to be seized."). This Court has made it clear that:

> [W]hat this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude. . . . *The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*

Stanford v. Texas, 379 U.S. at 485-486 (emphasis added) (citation omitted).

The actions of law enforcement in this case cannot be reconciled with the historical prohibition against general exploratory searches condemned by this Court and the Fourth Amendment's requirement that a warrant describe with specificity the objects to be seized. The search warrant affidavit makes no reference to any type of narcotic or controlled substance inside any portion of the premises sought to be searched. The affidavit and this investigation focused solely on the possession and distribution of counterfeit merchandise. The dog's handler admitted that the dog was not trained to alert on business records or counterfeit jeans, the two objects of the search specified in the search warrant. When the trial court asked why the dog was present during a search for counterfeit jeans, the canine handler replied, *"I have no idea, Your Honor." Pet. App.* at 8. The dog's presence on the raid team and her entry into the bedroom were not reasonably necessary to effectuate the purpose of the warrant – the search and

seizure of business records and counterfeit merchandise from U.S. Apparel. See *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) ("[T]he purposes justifying a police search strictly limit the permissible extent of the search."); *Wilson v. Layne*, 526 U.S. 603, 611 (1999) (Fourth Amendment requires that "police actions in execution of the warrant be related to the objectives of the authorized intrusion"). The dog's presence and entry exceeded the scope of the warrant by permitting officers to detect, search for, and seize drugs even though drugs were not mentioned in the affidavit. See *Maryland v. Garrison*, 480 U.S. at 84 ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."); *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) ("Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' ").

This Court has made it clear that the Fourth Amendment requires that inferences to be drawn from the evidence be drawn by a neutral and detached magistrate instead of "being judged by the officer engaged in the often competitive enterprise of ferreting out crime" and that when the right of privacy must reasonably yield to a search must "be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The drug dog's presence in Petitioner's bedroom was not authorized by a

neutral and detached magistrate but by the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime. For this reason, the court of appeals' decision cannot be reconciled with the bright line principles consistently applied by this Court banning general exploratory searches.

The lower courts' holdings present a clear and present danger that an officer may unilaterally decide to add a drug-detecting dog to every raid team without the intervention of a neutral and detached magistrate. This will give free rein for any police officer executing any search warrant for non-narcotic evidence to expand the scope of the search into a search for drugs by unilaterally adding a drug-detecting dog to the raid team. This scenario cannot be reconciled with the Fourth Amendment or the intent of the Framers that the people of this nation should forever "be secure in their persons, houses, papers, and effects from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. at 481.

This Court has made clear that the Constitution requires "that the deliberate, impartial judgment a judicial officer . . . be interposed between the citizen and the police. . . . " *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963). "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes." *Katz v. United States*, 389 U.S. 347, 357 (1967). The raid team in this case brought the dog along for one reason and one reason only – to search for illicit drugs. Indeed, the dog's handler necessarily admitted this was so in view of his concession that the dog was not trained to alert on the objects of this search, business records and counterfeit jeans, for which a

neutral and detached magistrate had found probable cause and issued a warrant. Because no probable cause was ever presented to the magistrate that illicit drugs could be found at U.S. Apparel, the scope of this search was not dictated by the magistrate, but by the officers themselves. This conduct simply cannot be reconciled with what this Court made manifest in *Katz*, that "bypassing a neutral determination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 359, *quoting Beck v. Ohio*, 379 U.S. 89, 97 (1964).

2. The Manner of the Warrant's Execution Violated the Fourth Amendment

Even if the court of appeals correctly held that the dog's presence did not exceed the scope of the warrant, this Court has held that *the manner of execution* can render an otherwise reasonable search unreasonable under the Fourth Amendment. See *Horton v. California*, 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure is unconstitutional without more."). While every police action while inside a home need not be explicitly authorized by the text of the warrant, this Court has made it clear that the Fourth Amendment "does require that police actions in execution of the warrant be related to the objectives of the authorized intrusion." *Wilson v. Layne*, 526 U.S. at 611. See also *Maryland v. Garrison*, 480 U.S. at 87 ("[T]he purposes justifying a police search strictly limit the permissible extent of the search.").

In *Wilson*, this Court held that the presence of newspaper reporters into a home during the attempted execution of a search warrant violated the Fourth Amendment because the presence of the reporters inside the home was not related to the objectives of the authorized intrusion. The drug dog's presence inside Petitioner's bedroom was, given the dog handler's admission that the dog was not trained to alert on the objects of the search warrant, as wholly unrelated to the objectives of the intrusion authorized by the search warrant as the presence of the reporters in *Wilson*. Because the drug dog's presence did not directly aid in the execution of the warrant, other than to transform a specific warrant into a general exploratory warrant for narcotics, the court of appeals' holding that the manner in which this search warrant was executed was not rendered unconstitutional by the dog's presence conflicts with this Court's decisions in *Horton* and *Wilson*. See also *Wilson v. Arkansas*, 514 U.S. 385, 394 (1995) (whether officers knock and announce their presence and authority before entering dwelling, as required by common law, is factor to be considered in determining reasonableness of search conducted pursuant to warrant); *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (Fourth Amendment does permit a blanket exception to knock-and-announce requirement for felony drug investigations conducted pursuant to search warrant).

The court of appeals held that the drug dog's presence in Petitioner's bedroom during a search for business records and counterfeit jeans: (1) did not exceed the scope of the search warrant; (2) did not fatally taint the warrant's manner of execution; and (3) did not transform a specific warrant into a general exploratory search for narcotics without the intervention of a neutral and detached

magistrate. The court of appeals' resolution of this important federal question stands in stark opposition to this Court's holdings in *Johnson*, *Stanford*, *Lo-Ji Sales, Inc.*, *Katz*, *Garrison*, *Horton*, and *Wilson*. For this reason, Petitioner submits that this Court should grant certiorari.

B. THE DECISION BELOW RESOLVES AN IMPORTANT FEDERAL QUESTION UNRESOLVED BY THIS COURT IN *U.S V. PLACE* AND THAT CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *U.S. V. THOMAS*

Even if this Court concludes that the presence of the drug-detecting dog did not exceed the scope of the search warrant, its judgment may not rest upon the grounds that the use of a drug detecting dog under the facts and circumstances presented by this case did not constitute a search. A "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobson*, 466 U.S. 109, 113 (1984). Petitioner recognizes that this Court has held that because canine sniffs are less intrusive than a typical search to determine the presence of contraband, the use of drug-detecting dogs to sniff baggage at airports and at highway checkpoints does not constitute a search. See *United States v. Place*, 462 U.S. 696, 707 (1983) (sniff of baggage at airport); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 453 (2000) (sniff of exterior of car at roadblock). But these cases turned on a different set of circumstances and stressed the public nature of the intervention. As this Court has concluded:

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage

> that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. . . .
>
> The canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, *which was located in a public place*, to a trained canine – did not constitute a "search" within the meaning of the Fourth Amendment.

United States v. Place, 462 U.S. at 707 (emphasis added). See also *City of Indianapolis v. Edmond*, 531 U.S. at ___, 121 S.Ct. at 453 (fact that officers walked drug-detection dog around the exterior of each car at a highway checkpoint did not transform the seizure into a search).

While virtually all state[5] and federal appellate courts, with the exception of the Second Circuit, seem to read this Court's opinion in *Place* as deciding once and for all tha a dog sniff can *never* be a search, three justices in *Place*

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[5] The Pennsylvania Supreme Court has held that a dog sniff in the corridors of a leased storage area was a search under Pennsylvania law. See *Comm. v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) ("The issue under Pennsylvania law, then, and contrary to *Place*, is not whether a search occurred, for it is our view that it did. . . ").

were of the belief that this issue was far from settled.[6] As Justice Brennan remarked:

> A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, presents a greater intrusion into an individual's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic devices.
>
> . . . I would leave the determination of whether dog sniffs of luggage amount to searches, and the subsidiary question of what standards should govern such intrusions, to a future case providing an appropriate, and more informed, basis for deciding these questions.

United States v. Place, 462 U.S. at 719-720 (Brennan, J., *concurring*).

But a practice that is not constitutionally intrusive in a public airport as in *Place* or on a public roadway as in *Edmond* may be intrusive when employed in the sanctity of a bedroom. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimension of an individual's home – a zone that finds its roots in clear and specific constitutional terms. . . . In terms that apply equally to searches and seizures of persons, the Fourth Amendment

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[6] Three justices in *Place* believed that the majority's discussion of the use of drug detection dogs was *dicta* since the case was simply decided by the determination that the prolonged seizure of the luggage went beyond an investigative stop authorized by *Terry v. Ohio*, 392 U.S. 1 (1968).

has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. at 589-590. See also *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct 2038, 2046 (2001) ("That line, we think, must not only be firm but also bright – "); *United States v. Karo*, 468 U.S. 705, 714 (1984) ("At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., *concurring*) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance and sophisticated communication systems."). This case presents this Court with the opportunity to resolve the important federal question left unanswered in *Place*: whether the use of a drug-detecting dog inside a citizen's bedroom is a "search," particularly where the warrant authorizing police to be inside the bedroom in the first place does not list illicit drugs as one of the objects to be seized.

While this Court has held in *Place* and *Edmond* that a canine sweep is not a "search" within the meaning of the Fourth Amendment when conducted in an airport and at a highway checkpoint respectively, it has not held that a dog sniff can *never* be a search, especially when conducted inside a residence. Such a sense-enhancing technique would exceed the minimum expectation of privacy that exists in one's home. See *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001). The question always to be asked is whether the use of a drug-detecting dog intrudes on a

legitimate expectation of privacy.[7] See *Katz v. United States*, 398 U.S. at 352.

This reasoning in *United States v. Thomas*, 757 F.2d 1359, 1366 (2nd Cir. 1985), led the Second Circuit to conclude that the use of a drug-detecting dog outside the front door of a private residence constitutes a search because "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." As Judge Cardamone wrote:

> Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. *With a trained dog, police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.* Here the defendant had a legitimate expectation of privacy that the contents of his closed apartment

[7] Professor LaFave has alluded to this Court's holding in *Katz* in discussing whether the use of a drug detecting dog under circumstances akin to those in this case is a search under the Fourth Amendment. "If the issue is framed in terms of whether a totally unrestrained use of such dogs in a dragnet fashion would be tolerable in a free society, one's answer might likely be no. If so, then under the test earlier suggested as appropriate under *Katz*, such use of trained dogs to detect concealed contraband should be held to constitute a Fourth Amendment search." *1 Search and Seizure* (2nd Ed.), Sec. 2.1(e), p. 315.

> would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, located in a public place, to a trained canine – did not constitute a 'search' within the meaning of the Fourth Amendment." *Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search. As the agent had no warrant, the search violated the Fourth Amendment.*

Id. at 1367. (emphasis added) (citations omitted).

The facts in this case are even more compelling than in *Thomas* where the dog sniff occurred outside the front door to a private residence. In the instant case, the canine sniff was not conducted in a public place or even outside the front door of a private residence but was conducted inside Petitioner's bedroom, a locale where there can be no legitimate debate that he had a reasonable expectation of privacy.[8] While the search warrant gave police the right to be inside his bedroom, Petitioner nevertheless had a legitimate expectation that the contents of closed containers such as his night stand would remain private, at least

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[8] See *United States v. Garcia*, 42 F.3d 604, 606 (10th Cir. 1994) (finding that a dog sniff of defendant's luggage in train's baggage car was not a search and distinguishing *Thomas* as its holding "focused on the heightened expectation of privacy inside a dwelling"); *United States v. Colyer*, 878 F.2d at 475-476 ("It is clear that the Second Circuit rested its decision on the 'heightened privacy interest an individual has *in his dwelling place*.' ") (emphasis in original).

in the sense that the officers could not determine from their own sense of smell what was within it. The use of the drug-detecting dog, therefore, impermissibly intruded on Petitioner's legitimate expectation of privacy. Because of Petitioner's heightened expectation of privacy, the dog's presence, entry, and sniff inside his bedroom constituted a search even though the officers had the right to be there to execute the warrant.[9] See *United States v. Thomas*, 757 F.2d at 136. See also *Payton v. New York*, 445 U.S. at 601 ("[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.").

Thomas is in conflict with decisions from a number of courts of appeals that have declined to follow its holding. See *United States v. Reed*, 141 F.3d 644, 649-650 (6th Cir. 1998); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993); *United States v. Colyer*, 878 F.2d 469, 475 (D.C. Cir. 1989). But the Second Circuit has never overruled its holding in *Thomas* and at least one circuit judge has found the reasoning in *Thomas* persuasive. See *United States v. Roby*, 122 F.3d 1120, 1126 (8th Cir. 1997) (Heaney, J., *dissenting*) ("[F]ocusing on the corridor outside Roby's hotel room, the majority erodes the reasonable expectation of privacy that we have always recognized. . . . The random

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[9] While the court of appeals held that *Thomas* was distinguishable "because there is evidence in the record that the officer would have searched *the safe* for business records . . . regardless of [the dog's] alert, *slip op.* at 10 (emphasis added), as recounted below, this record is silent as to whether police would have searched *the night stand* for business records or that it was objectively reasonable for police to believe that business records could have even fit within the night stand.

patrolling of hotel hallways with trained police dogs, in my judgment, goes against the personal and societal values protected by the Fourth Amendment."). This split between the Circuits as to whether a dog sniff can ever constitute a search is another reason why this Court should grant certiorari.

The important, yet unanswered, federal question of whether the use of a drug-detecting dog inside a citizen's bedroom constitutes a "search," particularly where the warrant authorizing police to be inside the bedroom in the first place does not list illicit drugs as one of the objects to be seized, is one that warrants the granting of certiorari.

C. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *KYLLO V. UNITED STATES*

In determining whether the drug-detecting dog's sniff constituted a search, this Court must also consider the impact of its recent decision in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001), a case that reaffirms the core holding in *Thomas*. In *Kyllo*, this Court addressed the question of whether police could use a non-intrusive thermal image scan of a home to support probable cause for the issuance of a search warrant. 533 U.S. at ___; 121 S.Ct. at 2041. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of an agent's vehicle across the street from the front of the house and also from the street in the back of the house. In denying Kyllo's motion to suppress evidence obtained in the execution of the search warrant issued on the basis of the thermal imager scan, the trial court found that the thermal imager "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat

being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities" and "[n]o intimate details of the home were observed. *Id.* Yet this Court nevertheless held:

> [W]e think obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search – at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against the government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

533 U.S. at ___; 121 S.Ct. at 2043. (citation omitted). Accordingly, Kyllo's conviction was reversed.

This Court's opinion in *Kyllo* reaffirms the core holding in *Thomas*: "Where, as here, the government uses a device that is not in general public use, to explore details of a home, that would previously have been unknowable without physical intrusion, their surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at ___; 121 S.Ct. at 2046. From this holding, it is clear that the dog's presence, entry, and sniff of Petitioner's night stand was a presumptively unreasonable, warrantless search that exceeded the scope of the warrant the officers had procured which did not authorize a search for drugs and by implication, the presence of a drug detecting dog. The dog's alert on the night stand was

illegally obtained regardless of the legitimacy of the presence of the officers and their warrant to search U.S. Apparel for business records and counterfeit merchandise. This Court can take judicial notice of the fact that the general public does not use drug-detecting canines, who are living, breathing, police-sense-enhancing technology. The police-sense enhancement is significant inasmuch as it is accomplished by a far superior, sensory instrument – the dog's nose. A warrantless dog sniff inside Petitioner's bedroom is no different than a constable's peep through a bedroom window[10] or a thermal imager scan from across the street. In fact, the warrantless dog sniff inside Petitioner's bedroom is even more intrusive than the thermal imager scan condemned in *Kyllo* because what is invisible to the human eye or undetectable to the human nose was inside Petitioner's bedroom unlike the procedure in *Kyllo* which occurred from across the street. At the end of the day, the dog's presence was a search and the degree of actual intrusion is of little moment if the intrusion itself is inside a bedroom. Indeed, as this Court noted in *Kyllo*, "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." 533 U.S. at ___; 121 S.Ct. at 2046.

As in *Kyllo*, the important federal question this case presents is "what limits there are upon this power of technology to shrink the realm of guaranteed privacy" that

[10] "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of the right to be let alone as guaranteed by the Fourth Amendment." *Brock v. United States*, 223 F.2d 681, 675 (5th Cir. 1955).

extends to the bedroom of every citizen. 533 U.S. at ___; 121 S.Ct at 2043. The use of a drug-detecting dog inside Petitioner's bedroom is the functional equivalent of, if not more egregious, than the thermal imaging scan directed at the residence from across the street. Again, to quote from this Court's opinion in *Kyllo*:

> . . . [I]n the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimum expectation of privacy that *exists*, and that is acknowledged to be *reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.*

533 U.S. at ___; 121 S.Ct. at 2043. (initial emphasis in original).

In *United States v. Karo*, 468 U.S. at 712, this Court wrote that, "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." These sentiments were echoed by one of the three judges who dissented from the denial of discretionary review before the Texas Court of Criminal Appeals. "There are crucial public policy implications in legitimizing the unusual warrant execution techniques utilized in appellant's case. Bringing along technology or animals that will ferret out *only* items not named in a warrant, based on the likelihood that the items found will coincide with the possible location of the items that *are* specified in the warrant, is not a practice that should become routine." *Amir v. State*, ___ S.W.3d at ___, *slip op.* at 6 (Meyers, J., *dissenting*). *Pet. App.* at 16. See also *Comm. v. Johnston*,

530 A.2d 74, 79 (Pa. 1987) ("[I]t is our view that a free society will not remain free if police may use [drug-detecting dogs], or any other crime detection device, at random and without reason."). Because this case provides this Court with a chance to reaffirm the fundamental tenet that the protections embodied in the Fourth Amendment are paramount within the sanctity of one's home, not to mention one's bedroom, it should grant this petition.

D. THE DECISION BELOW FAILS TO HONOR THIS COURT'S DECISIONS IN *UNITED STATES V. ROSS* AND *COOLIDGE V. NEW HAMPSHIRE*

It is equally plain that the search at issue may not be sustained on the grounds that the officers could have reasonably believed that the night stand contained business records.[11] To the extent that the court of appeals' holding rests on this theory, it is in conflict with this Court's decisions in *United States v. Ross*, 456 U.S. 798 (1982), and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (*plurality opinion*).

In *Ross*, this Court held that while, "A lawful search extends to areas in which objects may be found that pertain to the items on the warrant, including areas that may be closed and entry may be required," it also made it

[11] Not even the court of appeals believed that it was objectively reasonable for the officers to have found counterfeit jeans, the other object of the search warrant, inside the night stand.

clear that the permissible area of search in such a situation is not without limits:

> Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. *Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.*

United States v. Ross, 456 U.S. at 824 (emphasis added). See also *Maryland v. Garrison*, 480 U.S. at 84 ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.").

But before the prosecution may avail itself of the rule of law in *Ross*, it must first shoulder its burden, as the proponent of the evidence seized, to demonstrate that the items named in and seized by the authority of the warrant, could have fit with the closed container police opened.[12] As this Court held in *Coolidge v. New*

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[12] As one of the three dissenting judges on the Court of Criminal Appeals noted in his opinion dissenting from the denial of discretionary review, "Although it is within the realm of possibility, it is highly unlikely to think that either counterfeit clothing or business records

(Continued on following page)

Hampshire, 403 U.S. at 455, "[T]here must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it." Not only is this record silent on whether any officer reasonably believed that business records could be found inside Petitioner's bedroom night stand, this record is similarly silent as to whether the night stand was large enough to accommodate the business records named in the warrant. Because the scope of the search was circumscribed by the items named in the warrant, the prosecution failed to carry its burden under *Coolidge* to show that the items named in the warrant could have even fit within the night stand. Moreover, the prosecution also failed to carry its burden under *Ross* to show that it was objectively reasonable for police to believe that business records could be found in a night stand inside Petitioner's bedroom. Put simply, this record fails to provide any *subjective* basis – the officers' testimony or any other historical facts – that would support the court of appeals' legal conclusion that the search of the night stand was *objectively* reasonable. Accordingly, the search of the night stand because it *might* contain business records was as constitutionally infirm as the hypothetical search for undocumented aliens being transported in a van that this Court condemned in *Ross*.

Ross does not permit either law enforcement officers or appellate courts to guess or speculate as to objective reasonableness. Rather, the ultimate legal conclusion that something is objectively reasonable depends initially on

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would be found in a bedroom night stand." *Amir v. State*, ___ S.W.3d at ___, *slip op.* at 6 n.3 (Meyers, J., *dissenting*). *Pet. App.* at 16.

what facts, subjective and otherwise, exist with relation to the ultimate issue. While some issues such as this may be so obvious that specific factual evidence is unnecessary (looking in a small suitcase where the object of the search is a human being), this is not such a case. A decision that it was objectively reasonable to believe that business records could be found in the night stand is objectively unreasonable when, as here, there is no underlying factual basis for the legal conclusion of objective reasonableness. In holding that the drug dog's presence did not exceed the scope of the search authorized by the warrant on a record that reflects no more than speculation that the officers reasonably believed that business records could be found inside the night stand or that the records could even fit in the night stand, the court of appeals' decision conflicts with this Court's decision in *Ross* and *Coolidge*, and has decided an important federal question of law that warrants the granting of certiorari.

CONCLUSION

For all of the foregoing reasons, Petitioner requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Opinion issued January 17, 2002

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-99-00640-CR

RONEN JACK AMIR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court Harris County, Texas Trial Court Cause No. 794712

OPINION ON REMAND

The State charged appellant with possession of cocaine between four and 200 grams. After the trial court denied his motion to suppress, appellant pleaded guilty in accordance with an agreed recommendation as to punishment. The trial court deferred an adjudication of guilt and placed appellant on eight years community supervision. Appellant appealed the denial of the motion to suppress.

On February 24, 2000, this Court reversed the judgment of the trial court, holding that the search exceeded the scope of the warrant. *Amir v. State,* No. 01-99-00640-CR (Tex. App. – Houston [1st Dist.] Feb. 24, 2000) (not designated for publication). On September 13, 2000, the Court of Criminal Appeals granted the State's petition for discretionary review, reversed this Court's judgment, and

remanded the cause to this Court for proceedings consistent with its opinion. *Amir v. State,* 45 S.W.3d 88, 91 (Tex. Crim. App. 2001). We affirm.

Background

Based on information provided by a confidential informant and an undercover police officer, the Houston Police Department obtained a warrant to search the business premises of U.S. Apparel for evidence relating to distribution of counterfeit merchandise.[1] The search warrant stated:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and seize any and all items . . . that may be found therein including, but not limited to counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records showing the names, addresses, and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation

[1] The confidential informant told police that U.S. Apparel paid individuals to purchase authentic merchandise from retail stores. The individuals were then told to return counterfeit merchandise to the stores for a refund, in place of the authentic merchandise, using the original receipt. U.S. Apparel then sold the authentic merchandise to foreign buyers.

of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

The warrant authorized the search of U.S. Apparel at "5627 Star Lane, Suite A." U.S. Apparel shared a building with an unrelated business next door at "5625" Star Lane.[2] Within the confines of U.S. Apparel, appellant had established a residence that could be entered either through U.S. Apparel or from outside the building. The door entering the residence from inside U.S. Apparel was also marked "5625." The door leading to the residence from outside was not marked and was gated.

The officers entered U.S. Apparel, where they walked through a waiting area to a warehouse area, and then up the stairs to the second floor of the building. On the second floor, the officers proceeded through the door marked "5625" leading to appellant's residence.

A canine unit was present during the execution of the warrant. The narcotics dog searched the residential area. The dog signaled a positive alert for narcotics on a night stand in appellant's bedroom, and then on a locked safe. Believing that business records pertaining to U.S. Apparel might be located inside the safe, the officers asked appellant to open it. Appellant refused, and the police pried it open. Business records and cocaine were found in the safe. Drug paraphernalia and a semiautomatic pistol were also found in the area.

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[2] Police did not attempt to go inside the unrelated business, Texas International Motors, Inc.

On appeal, appellant argued that the trial court erred by denying the motion to suppress.[3] This Court held that the search of appellant's residence was illegal because it exceeded the scope of the warrant. The Criminal Court of Appeals reversed this Court's judgment, held that the search of appellant's residence did not exceed the scope of the warrant, and remanded the cause to this Court. *Amir,* 45 S.W.3d at 91. In accordance with the holding by the Court of Criminal Appeals that the search of the residence did not exceed the scope of the warrant, we turn to appellant's points of error regarding the search once the police were inside the residence.

On remand, appellant asserts the following three points of error: (1) the entry of the drug dog inside the premises exceeded the scope of the search warrant; (2) the cocaine seized from appellant's locked safe was inadmissible under the "mere evidence" rule; and (3) the warrant did not authorize the forcible entry and search of appellant's locked safe for cocaine.

Motion to Suppress Standard of Review

In reviewing a trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review in which we give almost total deference to a trial court's determination of historical facts and review de novo the court's application of the law of search and seizure. *Guzman v. State,* 955 S.W.2d 85, 88-89 (Tex. Crim. App.

[3] Appellant alleged violations of the Fourth Amendment of the United States Constitution, article I section 9 of the Texas Constitution, and article 38.23 of the Code of Criminal Procedure.

1997). In a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ballard,* 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). We afford almost total deference to a trial court's determination of historical facts that the record supports, especially when the findings are based on an evaluation of credibility and demeanor. *Guzman,* 955 S.W.2d at 89.

"Mere Evidence" Rule

In his second point of error, appellant contends that cocaine seized from appellant's locked safe was inadmissible under the "mere evidence" rule.

"Mere evidence" is evidence connected with a crime, but does not consist of fruits, instrumentalities, or contraband. *Joseph v. State,* 807 S.W.2d 303, 307 (Tex. Crim. App. 1991). Officers may seize mere evidence when the objects discovered and seized are reasonably related to the offense under investigation and the discovery is made in the course of a good faith search conducted within the parameters of a valid search warrant. *Id.* The scope of a search, during which "mere evidence" may be found, is restricted to the object of the search and the places in which there is probable cause to believe it may be found. *Id.*

In *Joseph,* the search warrant authorized the seizure of marijuana. *Id.* at 307. The officer testified that he looked inside an envelope, even though he knew he would not find marijuana there. *Id.* The court held that the letter found inside the envelope was not properly seized because (1) looking inside the envelope exceeded the scope of the search authorized and (2) the contents of the envelope

were not in plain view. *Id.* at 307-09. The letter, therefore, was mere evidence, rather than fruits, instrumentalities, or contraband. *Id.* at 309.

The police in *Joseph* found a letter during a search for drugs. *Id.* In this case, however, the facts are reversed: the police found drugs during a search for business records. Because mere evidence "does not consist of . . . contraband," the cocaine seized here is not mere evidence. *See id.* at 307. Thus, appellant's argument is without merit.

The second point of error is overruled.

Locked Safe

In his third point of error, appellant contends that the cocaine seized from the locked safe was inadmissible because the warrant did not authorize entry into the locked safe.

A lawful search extends to areas in which objects may be found that pertain to the items on the warrant, including areas that may be closed and entry may be required. *United States v. Ross,* 456 U.S. 798, 820-21, 102 S. Ct. 2157, 2170-71 (1982); *Hughes v. State,* 843 S.W.2d 591 (Tex. Crim. App. 1992) (holding that police entry into car trunk, after searching house for counterfeit currency, was within scope of warrant). A search extends to gaining entry to or opening areas in which the objects of the search warrant might be found. *Ross.* 456 U.S. at 820-21, 102 S. Ct. 2157.

The warrant authorized a search of 5627 A Star Lane for items including, but not limited to "counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel

pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel." The Court of Criminal Appeals held that the search of appellant's residence was within the scope of the warrant. *Amir,* 45 S.W.3d at 91. Therefore, once the officers were inside the residence, the warrant allowed a search for items connected with counterfeit merchandise and business records pertaining to U.S. Apparel. The police were authorized to search wherever business records might be hidden. Officer Carmouche testified that in his experience a safe might contain business records.

Probable cause to search exists when facts and circumstances within the knowledge of the officer on the scene would lead a reasonable person to believe that an instrumentality of a crime or evidence of a crime will be found. *McNairy v. State,* 835 S.W.2d 101, 106 (Tex. Crim. App. 1991). We conclude that it was reasonable for the officers to believe, based on the totality of the circumstances, that the safe might contain business records. *See $19,070.00 v. State,* 869 S.W.2d 608, 613 (Tex. App.–Houston [14th Dist.] 1994, no pet.) (holding that search of safe and seizure of currency found therein was not outside of scope of search warrant for controlled substances).

Once the officers lawfully opened the safe to search for business records, they discovered the cocaine in plain view. Accordingly, the officers were authorized to seize the cocaine under the plain-view doctrine. *See Walter v. State,* 28 S.W.3d 538, 541 (Tex. Crim. App. 2000).

The third point of error is overruled.

Narcotics Dog

In his first point of error, appellant contends that the entry of the narcotics dog inside the premises exceeded the scope of the search warrant.

Officer Guerrero testified that the narcotics dog was trained to alert on drugs, not counterfeit Levi jeans or business records. When asked why the dog was at the scene of this search warrant for counterfeit jeans, Guerrero testified, "I have no idea."

Officer Carmouche later explained that he looked in the safe to ascertain "only if they may keep business records pertaining to the ownership and business records of the business." There is no evidence that the officer searched the safe only because the narcotics dog detected a scent.

The trial court specifically addressed its concerns about the dog's presence:

> The next question that I had to be concerned with what are they doing with a dog in there. That does concern me. I don't know why you need a drug warrant when you have a search warrant for counterfeit merchandise. I asked the officer why he looked in the safe and if only because the dog hit on the safe, I had a real problem with that. His response, "We looked in the safe because that's where the business records are often kept." I think that satisfies the right of the police in exercising of their rights under the warrant to search for items that were mentioned in the warrant.

In a suppression hearing, the trial court is the sole judge of the witnesses' credibility and the weight to be

given their testimony. *Guzman,* 955 S.W.2d at 89. The trial court was free to believe Officer Carmouche's testimony that he would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert. Thus, the dog's presence on the scene was not fatal.

Appellant relies on *United States v. Thomas,* 757 F.2d 1359, 1367 (2d Cir. 1985), which held that the warrantless use of a drug-sniffing dog outside the defendant's residence constituted a search that impermissibly intruded on the defendant's legitimate expectation of privacy. The facts of this case are distinguishable, however, because there is evidence in the record that the officer would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert.

Appellant urges this Court to differentiate between the cocaine found in the night stand and that found in the safe.[4] The warrant allowed a search for items connected with counterfeit merchandise and business records pertaining to U.S. Apparel. The police were authorized to search wherever business records might be hidden inside the residence. We conclude that it was reasonable for the officers to believe, based on the totality of the circumstances, that the night stand might contain items described in the warrant, such as: "documents and records" pertaining to counterfeit merchandise, ownership of U.S. Apparel, or names, addresses, and telephone numbers of employees and/or any other witnesses with information concerning the operation of U.S. Apparel. The warrant

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[4] The record is silent as to the quantity of cocaine recovered from each location.

described the scope of the search, and the officer's search stayed within it. The presence of the dog did not enlarge the scope of the warrant.

The first point of error is overruled.

Conclusion

We affirm the judgment of the trial court.

Adele Hedges
Justice

Panel Consists of Justices Cohen, Hedges, and Taft.

Do not publish. TEX. R. APP. P. 47.

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 287-02

RONEN JACK AMIR, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY

Meyers, J, *filed a dissenting opinion, in which* Price *and* Cochran, J.J., *joined.*

OPINION DISSENTING TO REFUSAL OF APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

In his second ground for review, appellant asks:

> WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE ENTRY OF A DRUG DOG INSIDE APPELLANT'S BEDROOM DID NOT EXCEED THE SCOPE OF A SEARCH WARRANT ISSUED TO SEARCH FOR AND TO SEIZE ITEMS OTHER THAN NARCOTICS.

Because I believe that this ground for review presents an important question of law about the proper scope and execution of a search warrant, and whether the legitimacy of a search can be invalidated by a search for items not named in the warrant, I dissent to the Court's denial of this ground for review.

On June 29, 1998, officers from the Houston Police Department executed a search warrant, which provided:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and seize any and all items . . . that may be found therein including, but not limited to counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records pertaining to ownership of U.S. Apparel, documents and records showing the names, addresses, and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

The officers executing this warrant searched the entire premises, including an area that appellant claimed was his private residence, with the assistance of a drug-sniffing dog. At the suppression hearing, the dog handler testified that the dog entered a bedroom in appellant's residence and alerted on a night stand.[1] The night stand contained cocaine. The dog also alerted on a locked safe, which contained cocaine. Appellant was charged by indictment with possession of a controlled substance,

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[1] Specifically, the dog's handler stated that the dog opened the drawer to the night stand and was then given a reward.

cocaine. After the trial court denied his motion to suppress, appellant pled guilty in accordance with a plea agreement. Pursuant to that agreement, the trial court deferred adjudication of guilt and placed appellant on eight years of community supervision. The trial court also required appellant to pay a $1,000.00 fine.

On direct appeal, the First Court of Appeals reversed the conviction because it determined that the search of the part of the building that appellant claimed to be his private residence exceeded the scope of the warrant. *Amir v. State,* No. 01-99-640-CR, 2000 WL 210601 (Tex. App. – Houston [1st Dist.] February 24, 2000) (not designated for publication). We reversed the judgment and remanded the cause to Court of Appeals after concluding that the search of the alleged residence did not exceed the scope of the warrant. *Amir v. State,* 45 S.W.3d 88 (Tex. Crim. App. 2001). On remand, the Court of Appeals considered appellant's remaining points of error and affirmed appellant's conviction.[2] *Amir v. State,* No. 01-99-640-CR (Tex. App. – Houston [1st Dist.] January 17, 2002) (not designated for publication) (op. on remand). It held, *inter alia,* that the presence of the drug-sniffing dog did not exceed the scope of the warrant:

> The warrant allowed a search for items connected with counterfeit merchandise and business records pertaining to U.S. Apparel. The police were authorized to search wherever business records might be hidden inside the

[2] Appellant had three remaining points of error in the Court of Appeals. Only one of these, the point of error relating to the drug-sniffing dog, is relevant to this opinion.

> residence. We conclude that it was reasonable for the officers to believe, based on the totality of the circumstances, that the night stand might contain items described in the warrant . . . . The warrant described the scope of the search, and the officer's search stayed within it. The presence of the dog did not enlarge the scope of the warrant.

Id. at 8-11. Appellant then petitioned this Court for discretionary review so that we could address whether or not the drug-sniffing dog's assistance caused the searches to exceed the scope of an otherwise legitimate warrant. According to appellant, the dog's presence and entry into appellant's residence exceeded the scope of the warrant because no evidence of probable cause to search for drugs had been presented to or found by the magistrate who issued the warrant.

The Court of Appeals' opinion addressed only whether the cocaine seized from appellant's residence fell within the warrant. *Id.* Essentially, the court reasoned that because the officers would probably have searched the places in which the narcotics were found regardless of the dog's presence, the dog's presence did not affect the validity of the search. This does not adequately address appellant's arguments because it never answers the fundamental question of the case: why was a drug-sniffing dog used in a search for a company's counterfeit clothing and business records?

A search warrant may not issue unless it is based upon probable cause. U.S. CONST. amend. IV; TEX. CONST. art. I, sec. 9; Tex. Code Crim. Proc. art. 18.01 (Vernon Supp. 2002). Probable cause must be established by

setting forth substantial facts in a sworn affidavit presented to the issuing magistrate. Tex. Code Crim. Proc. Ann. art. 18.01(b).

Here, Houston Police officers had a warrant to search for counterfeit clothing and business records. The probable cause affidavit supporting the warrant stated that the affiant "[had] reason to believe and [did] believe that *instruments used in the commission of the offense of Trademark Counterfeiting* . . . [were] located within U.S. Apparel." (Emphasis added). Yet despite the recitations in the affidavit, when the officers executed the warrant, they brought along a dog that had no training in searching for anything *other* than narcotics, as illustrated by the following colloquy from the suppression hearing:

> COURT: Are you normally called to the scene specifically because your canine unit is trained to alert on drugs? Is that basically what your purpose is?
>
> DOG HANDLER: Yes, Sir.
>
> Q: Does your canine – does your dog alert on counterfeit Levis?
>
> A: No, Sir.
>
> Q: So if you got a search warrant for the Levis, what does a canine unit dog [sic – do?] at a scene to be executed on for counterfeit items if your purpose is to find drugs, do you know?
>
> A: I have no idea, your Honor.
>
> . . . .
>
> DEFENSE COUNSEL: Let me ask you one other thing. Your dog is not trained to locate business records, is it?

DOG HANDLER: No sir, just narcotics.

Q: The dog is just narcotics?

A: Yes, sir.

Q: Not anything else?

A: That's true.

Any search performed or assisted by the dog was, by definition, a search for drugs, as the dog had no other training. Any search for drugs was a search for something outside the scope of the warrant. The Court of Appeals limited its decision to the legitimacy of the search without considering the impact of the drug-sniffing dog's presence. I think that the opinion thereby decides an important question of state and federal law that should be addressed by this Court. There are crucial public policy implications in legitimizing the unusual warrant execution techniques utilized in appellant's case. Bringing along technology or animals that will ferret out *only* items not named in a warrant, based on the likelihood that the items found will coincide with the possible location of the items that *are* specified in the warrant,[3] is not a practice that should become routine. I therefore dissent to the denial of appellant's petition for discretionary review.

Filed: September 18, 2002.

Publish

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[3] Although it is within the realm of possibility, it is unlikely to think that either counterfeit clothing or business records would be found in a bedroom night stand.

Opinion issued February 24, 2000

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-99-00640-CR

RONEN JACK AMIR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 794712

OPINION

The State charged appellant by indictment with possession of a controlled substance, namely cocaine. He moved to suppress the cocaine seized at his residence, and the trial judge denied the motion. He then pled guilty in accordance with an agreed recommendation as to punishment. The trial judge deferred an adjudication of guilt and placed him on eight years community supervision. He now appeals the granting of the motion to suppress. We reverse and remand.

Background

Based on information provided by a confidential informant and an undercover police officer, the Houston

Police Department obtained a warrant to search the business premises of U.S. Apparel for evidence relating to distribution of counterfeit merchandise.[1] The search warrant stated:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and seize any and all items . . . that may be found therein including, but not limited to counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise . . . and any computer equipment used in the operation of U.S. Apparel.

At the time of the search, U.S. Apparel shared a building with an unrelated business at 5625 Star Lane. Within the confines of U.S. Apparel, appellant established a residence that could be entered either through U.S. Apparel or from outside the building. The door entering appellant's residence from inside U.S. Apparel was also marked "5625." The door leading to appellant's residence from outside the building was not marked and was gated.

The officers entered U.S. Apparel, where they walked through a waiting area to a warehouse area, and then up

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[1] The confidential informant told police that U.S. Apparel paid individuals to purchase authentic merchandise from retail stores. The individuals were then told to return counterfeit merchandise to the stores for a refund, in place of the authentic merchandise, using the original receipt. U.S. Apparel then sold the authentic merchandise to buyers in the Middle East.

the stairs to the second floor of the building. On the second floor, the officers located the door marked "5625" leading to appellant's residence. The officers proceeded through the door, where they found appellant and two women. Despite appellant's objections, with the assistance of a narcotics dog, the officers searched the entire residence, including a locked safe. The officer's seized cocaine, drug paraphernalia, and a semiautomatic pistol from the residence.

In three points of error, appellant argues that the trial judge erred by denying the motion to suppress because the search of his residence violated the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure.[2] We agree.

Motion to Suppress Standard of Review

In a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ballard,* 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). We afford almost total deference to a trial judge's determination of historical facts that the record supports, especially when the findings are based on an evaluation of credibility and demeanor. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review *de novo* a trial judge's determination of mixed questions of law and fact that do not turn on an evaluation of credibility. *Id.* On a question of

[2] Appellant alleges violations of the Fourth Amendment of the United States Constitution, Article I § 9 of the Texas Constitution, and Article 38.23 of the Texas Code of Criminal Procedure.

the application of law to facts, we review the evidence in the light most favorable to the trial judge's ruling. *Id.*

The Search

Appellant argues that the trial judge erred by denying the motion to suppress because the search of his residence exceeded the scope of the search warrant. He further argues that the search cannot be upheld under any recognized exception to the warrant requirement.

General exploratory searches are illegal. *Joseph v. State,* 807 S.W.2d 303, 307 (Tex. Crim. App. 1991). A valid warrant based on probable cause is necessary to conduct a search unless one of the exceptions to the warrant requirement is appropriate. *Id.* The purpose of a warrant is (1) to ensure that there is adequate probable cause to search and (2) to prevent the mistaken execution of the warrant against an innocent third party. *Morales v. State,* 640 S.W.2d 273, 275 (Tex. Crim. App. 1982).

In *Morales,* the court of criminal appeals held that a search of an entire multi-unit dwelling was illegal because the warrant only called for the search of one of the dwellings. *Id. Morales* is distinguishable because it dealt with the inaccurate description of the dwelling contained in the warrant. *Id.* Nevertheless, the principle is the same: for a search to be legal, the scope must be limited to the description contained in the warrant. *See id.*

In the present case, the warrant called for the search of U.S. Apparel at 5627 Star Lane, Suite A, Houston, Harris County, Texas. The warrant further called for the seizure of counterfeit merchandise and any records,

documents, or computer equipment pertaining to counterfeit merchandise or the operation of U.S. Apparel's business. The warrant did not call for the search of appellant's residential area clearly marked "5625," which was located inside U.S. Apparel at "5627 A." The warrant did not mention appellant by name or specify that drugs, or drug paraphernalia were items to be seized during the search. In fact, the canine unit officer testified that his dog is trained to alert to drugs, not counterfeit Levi's. He further testified that he did not know why he was asked to be at the scene during the search.

The State contends that *Cannady v. State* and *U.S. v. Carrillo-Morales* govern this case. In *Cannady,* the court of criminal appeals held a search of two offices valid, despite only having authority to search one, because the walls between them had been removed to create one large office. 582 S.W.2d 467, 468-69 (Tex. Crim. App. 1979). In *Carillo-Morales,* the Fifth Circuit permitted the search of a residence inside of a business because the officers acted reasonably in believing that the residence was part of the business. 27 F.3d 1054, 1064 (5th Circ. 1994). In that case, the two areas were similar in appearance and had the same business name posted on the outside. *Id.* Further, the officers did not know it was the defendant's residence until after the search. *Id.* at 1063.

These cases are distinguishable. First, unlike in *Cannady,* U.S. Apparel and appellant's residence were separated by walls and a door that was marked with a different address; they were not the same entity. Additionally, unlike in *Morales-Carillo,* appellant's residence could not have been reasonably confused with the premises of U.S. Apparel. When the police entered the door, appellant informed them that they were in his residence. Moreover,

the area contained amenities such as a bedroom, a bathroom, a kitchen, and a living room. The U.S. Apparel premises contained a waiting room, a warehouse area, and offices.

In *State v. Chavarria,* this Court upheld the granting of a motion to suppress because the police searched a dwelling in a duplex when the officers, on arriving at the scene, knew that there were discrepancies between the warrant and the dwelling. 992 S.W.2d 22, 25 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd). We held that the possibility of invasion of an innocent third party's privacy was too great to validate the search and that the discrepancies should have been investigated before the search. *Id*

There is the same possibility in this case. The adjacent business's address was 5625 Star Lane – the same address posted on the door of appellant's residence. The officers testified that there was no way to enter the adjacent business from inside appellant's residence. However, the State did not present any evidence establishing that the officers knew this before entering and searching appellant's residence. Thus, it is reasonable to assume that when the officers entered the residence, they did not know for certain whether they were entering the adjacent business, which would have been a violation of that business's right to privacy.

Additionally, one of the officers at the scene testified that the thirteen officers who participated in the search could have secured the scene and could have waited until a search warrant for the residence was obtained. Like *Chavarria,* on realizing that there was a residence inside U.S. Apparel, the officers should have secured the scene and obtained a separate search warrant for the residence

if they had probable cause it contained contraband. *See Chavarria,* 992 S.W.2d at 25.

Finally, the evidence seized at 5625 Star Lane cannot be considered "mere evidence," such to validate its seizure. In some instances, "mere evidence," which is not specifically listed in a warrant, may be discoverable. *Joseph,* 807 S.W.2d at 307. "Mere evidence" is evidence connected with a crime, which is not fruits, instrumentalities, or contraband. *Id.* Officers may seize "mere evidence" when the objects discovered and seized are reasonably related to the offense under investigation, and the discovery is made in the course of a good faith search conducted within the parameters of a valid search warrant. *Id.* The scope of a search, during which "mere evidence" may be found, is restricted to the object of the search and the places where there is probable cause to believe it may be found. *Id.*

Here, the cocaine was not connected to the crime that was being investigated – distribution of counterfeit merchandise. Rather, it was obtained as a result of an illegal search not conducted within the parameters of the valid search warrant. Therefore, the evidence seized was not "mere evidence." *See id.*

Conclusion

Given the evidence adduced at the hearing, we find that it was error to deny the motion to suppress because the entry, search, and seizure of evidence from appellant's residence were illegal. This error was constitutional in nature and contributed to the punishment assessed in that the subject evidence was used to secure appellant's plea. As such, the error was harmful. *See* TEX. R. APP. P. 44.2(a);

Woodberry v. State, 856 S.W.2d 453, 458-59 (Tex. App. – Amarillo 1993, no pet.).

We sustain points of error one, two, and three.

We reverse the judgment of the trial court and remand the case for further proceedings.

Adele Hedges

Justice

Panel consists of Justices O'Connor, Hedges, and Price.[3]

Do not publish. TEX. R. APP. P. 47.

[3] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

(LOGO)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 951-00

RONEN JACK AMIR, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY

Johnson, J., *delivered the opinion for a unanimous Court.* Keller, J., *filed a concurring opinion, in which* Keasler *and* Hervey, JJ., *joined.*

OPINION

Appellant was charged by indictment with possession of a controlled substance, cocaine. After his motion to suppress the cocaine seized at his residence during a search under warrant was denied by the trial court, he pled guilty in accordance with an agreed recommendation as to punishment. The trial court deferred adjudication of guilt and placed him on eight years community supervision.

On appellant's appeal of the denial of the motion to suppress, the court of appeals, finding that the search of the premises exceeded the scope of the warrant, reversed

and remanded. *Amir v. State,* No. 01-99-00640-CR (Tex. App. – Houston [1st Dist.] February 24, 2000) (not designated for publication), 2000 Tex. App. LEXIS 1222. We granted the state's petition for discretionary review[1] to consider the conclusion of the court of appeals that the search exceeded the scope of the warrant. We reverse and remand.

Based on information provided by a confidential informant and an undercover police officer, the Houston Police Department obtained a warrant to search the business premises of U.S. Apparel for evidence relating to distribution of counterfeit merchandise. The search warrant stated:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane,

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[1] We granted the state's petition on the following grounds: "(I) Can a suspect circumvent the lawful execution of a search warrant by arbitrarily carving out a portion of his business with numbers placed on an interior door that indicate the interior door is part of another physical address? (II) Do police officers exceed the scope of a search warrant of a business by entering what appears to be a residential portion of the structure, but is nevertheless located within the confines of a business address? (III) Does the mere presence of four numbers placed on the interior door of a business that is the subject of a valid search warrant create an additional area not covered by the search warrant? (IV) Can an individual carve out a cone of protection within the confines of his business by setting up an area of habitation within that same physical address? (V) Does a lawful search of the fixed premises of a business extend to every part of the premises, including an area used for residential purposes where contraband may likely be found? (VI) Can cocaine by [sic] seized as 'mere evidence' when it is found on the premises that are the subject of a valid search warrant even though the cocaine was not named in the search warrant and was not connected to the crime being investigated?"

> Suite A, Houston, Harris County, Texas, with the authority to search for and seize any and all items . . . that may be found therein including, but not limited to counterfeit Levi,[sic] Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise . . . and any computer equipment used in the operation of U.S. Apparel.

At the time of the search, the exterior of the building occupied by U.S. Apparel appeared to be divided into two halves, each with its own address. One half was occupied by U.S. Apparel at 5627 Star Lane, Suite A, the other half by Texas International Motors at 5625 Star Lane. An unmarked exterior door led to the residence inside U.S. Apparel. Pursuant to the warrant, police officers entered U.S. Apparel at 5627 Star Lane, Suite A. They walked through a reception area to a warehouse area, and then up the stairs to the second floor of the building. On the second floor, the officers found an unlocked door marked "5625" and entered the room beyond, where they found appellant and two women. Appellant asserts that this room is his residence and is not part of 5627 A Star Lane. Over appellant's objections, the officers, with the assistance of a narcotics dog, searched the entire premises of 5627, including the area which appellant claimed was his residence. They seized cocaine, drug paraphernalia, and a semiautomatic pistol.

At the suppression hearing, the state called as witnesses three police officers who had participated in the execution of the search warrant. The state also introduced into evidence copies of appellant's Texas driver's license and Texas identification card and a copy of the search warrant, as well as various photographs and a videotape

depicting the scene of the search. Appellant introduced into evidence a photograph showing a safe on the premises which the police had broken open.[2]

At the conclusion of the hearing, the trial court denied the motion to suppress, stating:

> And my opinion is they had a search warrant for 5627 Star Lane. The fact that the defendant carved out a portion of 5627 and placed a designation of 5625 on the door that entered into another portion of 5627 doesn't mean all of a sudden now that the officers have to go back and get a new search warrant. The State brought out if they got a search warrant for 5625, they would be searching the International Motors Company next door, which has no connection to this room that is designated 5625 found within 5627. However, would you ever get a warrant to this room with the 5625 posted on the door without their [sic] being a confusion as to which 5625 we are talking about? To me, the warrant was for 5627, suite A. They searched 5627, Suite A.

The court of appeals, in reversing the trial court's denial of the motion to suppress, noted, *inter alia,* that the warrant called for the search of U.S. Apparel at 5627 Star Lane, Suite A, Houston, Harris County, Texas, but did not call for the search of appellant's residential area marked 5625, which was located inside U.S. Apparel at 5627 A.

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[2] Appellant also attempted to introduce into evidence a utility bill from Houston Light & Power. After the state objected on various grounds, the trial court excluded the utility bill on the ground that it was irrelevant. Although appellant made a bill of exception concerning this matter, he did not appeal the exclusion of this evidence.

Amir, 2000 Tex. App. LEXIS 1222, at *6. It found that U.S. Apparel and appellant's residence were separated by walls and a door that was marked with a different address, so that they were not the same entity. *Id.* at *7. It further found that: appellant's residence could not have been reasonably confused with the premises of U.S. Apparel; when the police entered the door, appellant informed them that they were in his residence; and the area contained amenities such as a bedroom, a bathroom, a kitchen, and a living room, while the U.S. Apparel premises contained a reception area, a warehouse area, and offices. *Id.* Based on this, the court found that the possibility of invasion of an innocent third party's privacy was too great to validate the search and that the discrepancies should have been investigated before the search. *Id.* at *8. Thus, it held that the search was illegal, because it exceeded the scope of the warrant. *Id.* at *10.

In reversing the trial court's denial of the motion to suppress, the court of appeals set out the relevant standards of review on a motion to suppress, stating:

> In a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ballard,* 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). We afford almost total deference to a trial judge's determination of historical facts that the record supports, especially when the findings are based on an evaluation of credibility and demeanor. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review *de novo* a trial judge's determination of mixed questions of law and fact that do not turn on an evaluation of credibility. *Id.* On a question of the application of law to facts, we review the

> evidence in the light most favorable to the trial judge's ruling. *Id.*

Id. at *4. However, the court of appeals failed to set out what evidence was presented at the hearing on the motion to suppress or its own application of law to facts.

The warrant authorized the police to "search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A. . . . " The trial court found, and the parties do not dispute, that appellant's claimed residence was connected by a unlocked door to the 5627 A address and was not connected to the 5625 address. The trial court also found that appellant had "carved out" a portion of the 5627 address and placed the numbers 5625 on the door, that 5625 is the address of another business that had no connection to U.S. Apparel, and that business records for U.S. Apparel were found in the residence area. In addition, evidence admitted at the suppression hearing showed that, when appellant obtained a Texas driver's license, he stated to the Department of Public Safety that 5627 A Star Lane was his home address, thus conceding that his residence was part of 5627 A Star Lane.

Federal case law on this issue generally holds that the scope of the warrant was not exceeded in circumstances similar to those presented here. *See, e.g., United States v. Prout,* 526 F.2d 380, 385-8 (5th Cir.) (apartment located in building attached to building containing premises specified in warrant held to be part of those premises, where entrance to the latter opened into foyer shared with the former), *cert. denied,* 429 U.S. 840, 97 S. Ct. 114, 50 L. Ed.2d 109 (1976); *United States v. Wright,* 468 F.2d 1184, 1185-6 (6th Cir. 1972) (building attached to premises specified in warrant held to be part of those premises,

where door connected the two and the attached building was generally considered by witnesses to be part of the named premises), *cert. denied,* 412 U.S. 938, 93 S. Ct. 2771, 37 L. Ed.2d 397 (1973); *United States v. Evans,* 320 F.2d 482, 483 (6th Cir. 1963) (attic attached to premises specified in warrant held to be part of premises, where attic could be accessed only through the premises named in the warrant and door between the two could not be locked or fastened from either side); *see also United States v. Kaye,* 432 F.2d 647, 649 (D.C. Cir. 1970) (search of apartment attached to store specified in warrant held invalid, where there was no access to store from apartment, and no apparent connection between the two).

Based on the evidence adduced at the hearing and the trial court's findings, we hold that the court of appeals erred in holding that the search exceeded the scope of the warrant. The state's third ground for review is sustained.[3] The judgment of the court of appeals is reversed, and the cause is remanded for proceedings consistent with this opinion.

Johnson, J.

Date delivered: May 16, 2001

En Banc

Publish

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[3] Based on our disposition of the state's third ground for review, it is unnecessary for us to review the remaining grounds. Therefore, those grounds are dismissed.

STATE'S EXHIBIT 3

THE STATE OF TEXAS §
§ SEARCH WARRANT
COUNTY OF HARRIS §

TO THE SHERIFF OR ANY PEACE OFFICER OF HARRIS COUNTY TEXAS

GREETINGS:

WHEREAS, Complaint in writing, under oath, has been made before me by Wade Cortez, a peace officer, employed by the Houston Police Department, which complaint is attached hereto and expressly made a part hereof for all purposes and said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant:

YOU ARE THEREFORE COMMANDED to forthwith search the place therein named to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and to seize any and all items which are more particularly described in the attached affidavit that may be found therein including, but not limited to counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records showing the names, addresses and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

HEREIN FAIL NOT and due return make hereof.

WITNESS MY SIGNATURE on this the 29th day of June A.D. 1998 at 2:55 O'clock, P.M.

/s/ William Hatten
MAGISTRATE
JUDGE 178 District Court
Harris County, Texas

THE STATE OF TEXAS	§	AFFIDAVIT FOR
	§	SEARCH WARRANT
COUNTY OF HARRIS	§	

I, Wade Cortez, a peace officer employed by the Houston Police Department do solemnly swear that I have reason to believe and do believe that instruments used in the commission of the offense of Trademark Counterfeiting, and which are more particularly described herein are located within U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas. This location is more particularly described as an apparel warehouse business with a sign "U.S. Apparel" on the warehouse. This location is under the care, custody and control of Ronen Jewston Amir and Rami Amir.

MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

Your Affiant personally met with Michael D. McKenna, who told Affiant he is employed as a private investigator with the Guidry Group, a security and private investigative consulting company doing business in Dallas, Texas. He told Affiant that, in the course of his employment, he represents numerous manufacturers in the investigation of the sale and distribution of counterfeit merchandise,

including Levi, Strauss & Co. and Nike. He told Affiant that he has received instruction and training from Levi, Strauss & Co. and Nike in how to determine if items purportedly made by them is counterfeit or not. He told Affiant that Levi, Strauss & Co. and Nike own certain trademarks, which are registered on the principal register of the United States Patent and Trademark Office. He stated he is able to determine if items purportedly made by Levi, Strauss & Co. and Nike are counterfeit or legitimate.

Affiant on June 28, 1998 spoke with a confidential informant, who requested their identity remain anonymous throughout this affidavit. Affiant determined that this informant is gainfully employed. This informant told Affiant that he has committed the offense of Trademark Counterfeiting on numerous previous occasions. This informant told Affiant that he has acquired counterfeit Levi, Strauss & Co. jeans from U.S. Apparel. This informant told Affiant that Ronen Jewston Amir also known as "Jack" and Rami Amir are the owners of "U.S. Apparel" located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, and that they have a regular practice of distributing counterfeit Levi, Strauss & Co. jeans at said location to persons to take to area department stores to exchange them for real and legitimate Levi, Strauss & Co. jeans.

On June 29, 1998, Affiant, along with McKenna, and peace officers of the Major Offender Division of the Houston Police Department went to the 5600 block of Star Lane, Houston, Harris County, Texas. Affiant instructed officer Paul Powell, to enter U.S. Apparel, which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas to receive counterfeit Levi, Strauss & Company jeans from

"Jack." Officer Powell told Affiant he entered said location along with a black male who previously identified himself to Officer Power as Adrian, and who was to help officer Powell obtain counterfeit jeans to exchange them at area department stores. Officer Powell told Affiant that Adrian told officer Powell that "Jack" would pay him $3.00 for each counterfeit item exchanged.

Officer Powell told Affiant that while inside U.S. Apparel, Adrian began to pick out jeans, and he met a white male who identified himself as "Rami." Powell told Affiant that while in the warehouse he heard "Rami" give Adrian various instructions and directions. Powell also told Affiant that after a short period of time, he loaded 22 pairs of jeans and 21 shirts selected by Adrian into his truck, and Adrian gave him various department store bags to use in exchanging the counterfeit merchandise. Powell told Affiant that while driving away, Adrian gave him instructions on how to exchange the counterfeit merchandise, including lying about how it was purchased.

Officer Powell drove to Northwest Mall, Houston, Harris County, Texas, where he met Affiant, and Adrian was placed under arrest. Affiant saw the jeans and shirts in Officer Powell's truck and showed them to McKenna. Affiant saw McKenna examine the jeans and shirts and McKenna told Affiant the jeans were in fact counterfeit, the jeans had counterfeit Levi, Strauss & Co. trademarks, and they are illegal to distribute under Section 32.23 of the Penal Code. McKenna also told Affiant the shirts were in fact counterfeit, the shirts had counterfeit Nike trademarks, and they are illegal to distribute under Section 32.23 of the Texas Penal Code.

Officer Powell told Affiant that while inside U.S. Apparel he saw similar jeans and shirts. Officer Powell told Affiant he also saw what appeared to be a business office inside the warehouse area.

WHEREFORE, PREMISES CONSIDERED, Affiant respectfully requests that a warrant issue authorizing Affiant, or any other peace officer of Harris County, Texas to enter the aforementioned premises which is U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with authority to search for and to seize any and all counterfeit merchandise that is found therein and which are instruments used in the commission of the offense of Trademark Counterfeiting, including, but not limited to counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and records of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records showing addresses and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

but not limited to the specific items enumerated within this affidavit, he [sic] property and items set out earlier in this affidavit.

/s/ Wade Cortez
WADE CORTEZ, AFFIANT

Sworn to and Subscribed before me on this the 29th of June, 1998, A.D.

/s/ William Hatten
MAGISTRATE
Judge, 178th District Court
Harris County, Texas

(2)

Supreme Court, U.S.
FILED
MAR 8 2003
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No. 02-871

In The

Supreme Court of the United States

RONEN JACK AMIR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The First District

RESPONDENT'S BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED

The petitioner presents one question for review:

1. Whether the Fourteenth Amendment's prohibition against general exploratory search warrants is violated when peace officers bring a drug-detecting dog to participate in a search when drugs are not among the items specified for seizure in the search warrant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE WRIT	4
I. NO CONFLICT EXISTS BETWEEN THE OPINION OF THE COURT OF APPEALS AND THIS COURT'S DECISIONS IN *JOHNSON, STANFORD, LO-JI SALES, INC., KATZ, GARRISON, HORTON* AND *WILSON*	5
II. THE DECISION BELOW DOES NOT RESOLVE AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT ALREADY BEEN RESOLVED	11
III. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *KYLLO V. UNITED STATES*	16
IV. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS IN *UNITED STATES V. ROSS* AND *COOLIDGE V. NEW HAMPSHIRE*	19
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

City of Indianapolis v. Edmond, 531 U.S. 32 (2000).....14

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....4, 7, 20

Crockett v. State, 803 S.W.2d 308 (Tex. Crim. App. 1991).....15

Hill v. State, 51 S.W.2d 244 (Tex. App. – Houston [14th Dist.] 1997, no pet.).....18

Horton v. California, 496 U.S. 128 (1990).....8, 9, 11, 19

Johnson v. United States, 333 U.S. 10 (1948).....8, 11

Katz v. United States, 389 U.S. 347 (1967).....8, 11, 20

Kyllo v. United States, 533 U.S. 27 (2001).....*passim*

Lo-Ji, Inc. v. New York, 442 U.S. 319 (1979).....5, 6, 7, 11

Manuel v. State, 994 S.W.2d 658 (Tex. Crim. App. 1999)..... 3

Maryland v. Garrison, 480 U.S. 79 (1987).....5, 7, 11

Michigan v. Summers, 452 U.S. 692 (1981).....11, 13, 14

People v. Dunn, 77 N.Y.2d 19 (1990).....15

Porter v. State, 93 S.W.3d 342 (Tex. App. – Houston [14th Dist.] 2002, pet. filed).....14

Smith v. Maryland, 442 U.S. 735 (1979).....17

Stanford v. Texas, 379 U.S. 476 (1965).....5, 6, 7

United States v. Jacobsen, 466 U.S. 109 (1984).....14, 18

United States v. Knotts, 460 U.S. 276 (1983).....17, 18

United States v. Place, 462 U.S. 696 (1983).....*passim*

United States v. Reed, 141 F.3d 644 (6th Cir. 1998)....14, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Ross, 456 U.S. 798 (1982).....4, 7, 19, 20

United States v. Tarazon-Silva, 960 F.Supp. 1152 (W.D.Tex. 1997).....14

United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985).....4, 15, 16

United States v. Williams, 504 U.S. 36 (1992).....12

Wilson v. Layne, 526 U.S. 603 (1999).....9, 10, 11

STATUTES

TEX. CODE CRIM. PROC. art. 38.23 (Vernon Supp. 2003).....2

TEX. HEALTH & SAFETY CODE § 481.115 (Vernon Supp. 2003).....2

STATEMENT

A confidential informant advised Houston police officers that individuals working for an enterprise called U.S. Apparel purchased authentic merchandise from retail stores and then returned counterfeit merchandise to the stores for a refund. Pet. App. 2 n.2. U.S. Apparel would then sell the authentic merchandise to foreign buyers. *Id.* Based upon the information provided by the informant and an undercover police officer, investigating officers obtained a search warrant for the business premises of U.S. Apparel. *Id.*

The search warrant provided:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and to seize any and all items which are more particularly described in the attached affidavit that may be found therein including, but not limited to, counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and record of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records showing the names, addresses, and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

Pet. App. 2.

The petitioner had established a residential area within the confines of the U.S. Apparel business premises. Pet. App. 3. In order to execute the search warrant, officers entered U.S. Apparel, walked through a waiting area to a warehouse area, and up the stairs to the second floor of the building. *Id.* On the second floor, officers proceeded into the residential area of the building and observed a safe and a nightstand within that area. *Id.*

The officers brought with them a dog trained to alert to the presence of narcotics, and the dog alerted to narcotics contained in the safe and the nightstand. Pet. App. 3. Officers asked the petitioner to open the safe because they believed it might contain business records pertaining to U.S. Apparel. *Id.* The petitioner refused to open the safe, so police officers pried it open, and discovered business records and cocaine. *Id.* Police officers also discovered cocaine in the nightstand drawer, and they found drug paraphernalia and a semiautomatic pistol nearby. *Id.*

The petitioner was charged by indictment in state district court with the felony offense of possession of more than four but less than 200 grams of cocaine. *See* TEX. HEALTH & SAFETY CODE § 481.115(d) (Vernon Supp. 2003). Pet. App. 1. He filed a motion to suppress the seized cocaine, alleging that the search violated the Fourth Amendment to the United States Constitution; Article I, section 9, of the Texas Constitution; and TEX. CODE CRIM. PROC. art. 38.23 (Vernon Supp. 2003) (the Texas statutory exclusionary rule). Pet. App. 4. The trial court denied the motion to suppress evidence, noting that although it was concerned about the presence of a dog at the scene, the police were authorized by the warrant to look in the safe because of the possibility that it contained the sort of business records described in the warrant. Pet. App. 8.

After his suppression motion was denied, the petitioner entered a plea of guilty, the trial court deferred adjudication of his guilt and placed him under community supervision for a period of eight years, and the petitioner gave notice of appeal.[1] Pet. App. 1.

The Court of Appeals for the First District of Texas initially held that the search of the petitioner's residence was illegal because it exceeded the geographic scope of the warrant. Pet. App. 4. The Court of Criminal Appeals reversed the decision of the court of appeals, holding that the search of the petitioner's residence did not exceed the scope of the warrant, and it remanded the case to the court of appeals to consider the remainder of the petitioner's points of error. Pet. App. 4.

On remand, the court of appeals affirmed the petitioner's conviction in an unpublished opinion, holding that the search of the safe was authorized by the warrant, in light of the officer's testimony that he believed that the safe may contain the sort of business records described in the warrant. Pet. App. 9. The court held that the police were authorized to search wherever business records might be hidden, and that it was reasonable for the officers to believe, based upon the totality of the circumstances, that the nightstand might contain items described in the warrant. Pet. App. 7, 9. Ultimately, the court of appeals held that the warrant properly delineated the scope of the search, that the police officers' search was

[1] Under Texas criminal procedure, a defendant is entitled to appeal from an order deferring adjudication of his guilt and placing him under community supervision. *See Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999).

authorized by the warrant, and that the presence of the dog did not expand the scope of the search beyond that authorized by the warrant. Pet. App. 10.

The Texas Court of Criminal Appeals denied discretionary review, with three judges dissenting. Pet. App. 11.

REASONS FOR DENYING THE WRIT

There is no compelling reason for this Court to grant the petition for writ of certiorari. The petitioner contends that the decision of the court of appeals conflicts with this Court's decisions banning general exploratory searches, and its decisions in *Kyllo v. United States*, 533 U.S. 27 (2001), *United States v. Ross*, 456 U.S. 798 (1982), and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). However, a review of those decisions reveals that no such conflict exists.

The petitioner also contends that the decision of the court of appeals resolves an important federal question unresolved by this Court in *United States v. Place*, 462 U.S. 696 (1983), and that it conflicts with the decision of the Court of Appeals for the Second Circuit in *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985). However, the Texas court of appeals relied upon the trial court's factual findings in resolving the suppression issue in this case, and a petition for writ of certiorari should not be granted on an asserted error regarding a trial court's factual findings. *See* United States Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . .").

Moreover, the opinion from which review is sought is unpublished and has no precedential value to the jurisprudence of Texas.

I. NO CONFLICT EXISTS BETWEEN THE OPINION OF THE COURT OF APPEALS AND THIS COURT'S DECISIONS IN *JOHNSON*, *STANFORD*, *LO-JI SALES, INC.*, *KATZ*, *GARRISON*, *HORTON* AND *WILSON*.

The Fourth Amendment to the United States Constitution provides that, "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The manifest purpose of the particularity requirement is to prevent general searches. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The Fourth Amendment does not permit open-ended warrants. *See Lo-Ji, Inc. v. New York*, 442 U.S. 319, 326 (1979). A warrant which does not purport to particularly describe the thing to be seized, but instead leaves it to the discretion of the officials conducting the search, violates the Fourth Amendment. *Id.*

This Court has held that the Fourth Amendment requirement that warrants particularly describe the things to be seized "makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Stanford v. Texas*, 379 U.S. 476, 485-486 (1965). In *Stanford*, this Court held that a

warrant ordering officers to search for books,[2] records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning a state Communist Party and its operations was a general warrant and violated the constitutional requirement that warrants shall particularly describe things to be seized. *Id.* In *Lo-Ji, Inc.*, this Court held that a warrant which left to the discretion of police officers the decision as to what was "obscene" did not particularly describe the things to be seized, and thus violated the Fourth Amendment. *Lo-Ji, Inc.*, 442 U.S. at 326.

In the present case, it is undisputed that the warrant particularly described the things to be seized from the premises of U.S. Apparel: counterfeit merchandise, documents and records pertaining to counterfeit merchandise, and documents and records pertaining to the ownership and employees of U.S. Apparel. The documents and records described in the warrant pertained to an illegal enterprise. The petitioner never challenged the validity or specificity of the description of the property to be seized, and the court of appeals found that the warrant adequately defined the scope of the search. Pet. App. 10.

Because the warrant in issue satisfied the Fourth Amendment requirement of particularity in the description of the items to be seized and was not a "general warrant," the petitioner is incorrect in arguing that the

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[2] This Court noted in *Stanford* that the word "books," as used in the warrant in issue in that case, referred to literary material, which is quite different from a "book" which is no more than a ledger of an unlawful enterprise. *Stanford*, 379 U.S. at 486, n.16.

opinion of the court of appeals conflicts with this Court's decisions in *Stanford* and *Lo-Ji Sales, Inc.*

The court of appeals correctly noted in its opinion that once the police officers were inside the residence, the warrant allowed them to search wherever business records might be hidden. Pet. App. 7, 9. This holding is consistent with this Court's decisions in *United States v. Ross*, 456 U.S. 798, 820-21 (1982), and *Garrison*, 480 U.S. at 84. Officers may search all areas in which items specified in the warrant may be found, including areas that may be enclosed. *Id.*

The officers in the present case searched areas in which business documents could be found, including the safe and the nightstand. The trial court believed the officer's testimony that he looked in the safe because business records are often kept in a safe, and its factual finding should be afforded great deference.

In the course of the search for items described in the warrant, the officers saw cocaine, and because they were in a place where they had a right to be, they were authorized to seize the cocaine under the "plain view" doctrine. *See Lo-Ji, Inc.*, 442 U.S. at 326 n.5 ("Of course, contraband may be seized without a warrant under the 'plain view' doctrine."); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) ("An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.").

The dog's presence at the scene was inconsequential. The court of appeals properly found that the dog's presence did not affect the legality of the search or the seizure

of the cocaine. Pet. App. 9. The court of appeals accurately found that the officers stayed within the scope of the search authorized by warrant. Pet. App. 10.

The petitioner incorrectly suggests the existence of a conflict between the opinion of the court of appeals and this Court's decisions in *Johnson v. United States*, 333 U.S. 10 (1948), and *Katz v. United States*, 389 U.S. 347 (1967). Neither of those cases required a determination of the scope of a search warrant.

Johnson involved a search of a hotel room without a warrant. *Katz* pertained to the government's warrantless activity in electronically listening to and recording a suspect's conversation as he spoke in a public telephone booth. This Court found in *Katz* that the government's eavesdropping constituted a search and that the warrantless search violated the defendant's Fourth Amendment rights. In the present case, officers gained lawful entry into the petitioner's business, including the residential area contained within that business, under the authority of a search warrant, and, consequently, *Johnson* and *Katz* are inapplicable and distinguishable.

The petitioner is also incorrect in his contention that the opinion of the court below conflicts with this Court's decision in *Horton v. California*, 496 U.S. 128 (1990). In *Horton*, this Court noted that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.* at 138. Thus, when a police officer has a "valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause," such suspicion does not "immunize the second item from seizure if it

is found during a lawful search for the first." *Id.* The Fourth Amendment does not prohibit warrantless seizure of evidence of a crime in plain view, even if discovery of the evidence was not inadvertent. *Id.*

In this case, officers were authorized by the valid warrant to enter and search any and all areas within the premises which could contain documents or records. The officers were authorized to look in the safe and nightstand under the authority of the search warrant. Consistent with this Court's holding in *Horton*, the court of appeals properly held that seizure of the drugs in plain view during the search for documents and records did not violate the petitioner's Fourth Amendment rights. *See Horton*, 496 U.S. at 138 (seizure of weapons not described in a warrant, but found in plain view while searching the defendant's residence for the stolen property described in the warrant, did not violate the Fourth Amendment, even though the weapons were not discovered "inadvertently").

Furthermore, the opinion of the court of appeals does not conflict with this Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), as contended by the petitioner. In *Wilson*, this Court held that it violated homeowners' Fourth Amendment rights when police officers brought a newspaper reporter and photographer with them when they entered the home, under the authority of an arrest warrant, to arrest the homeowners' son. *Wilson*, 526 U.S. at 611. This Court held that while not every police action inside a home "must be explicitly authorized by the text of the warrant," the Fourth Amendment does require that "police actions in execution of a warrant be related to the objectives of the authorized intrusion." *Id.*

In *Wilson*, the presence of reporters who did not engage in the execution of the warrant or assist police in their task was unrelated to the objective of the authorized intrusion, which was the arrest of the homeowners' son. *Id.* This Court noted, however, that although there was no constitutional justification for a media ride-along intrusion into the home while police executed an arrest warrant, it might be reasonable for police themselves to video-tape home entries. *Id.* In addition, the Court observed that the police were lawfully present in the home, and that the violation of the Fourth Amendment was the result of the presence of the media, rather than the police, in the home. *Id.* at 614 n.2. The Court also stated, "We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." *Id.*

Because this Court's opinion in *Wilson* involved a monetary suit for damages and not the exclusionary rule, it is inapplicable to the present case and does not conflict with the decision of the court below.

Also, this case differs from *Wilson* in that the canine unit cannot be said to constitute a "third party" present during execution of the search warrant. The canine unit was a part of the Houston Police Department, and was authorized to be present during the execution of the warrant, as would any other member of the police force. Canine units now constantly and routinely assist police officers in a wide variety of tasks, and they might be useful in the execution of a search warrant in several different ways. For instance, a canine unit could provide protection against other dogs on the premises, warn the police of explosive devices which might jeopardize their safety during a search, or assist in seeking out persons

hidden within the premises, in order to minimize the risk of harm to the officers. *See Michigan v. Summers*, 452 U.S. 692, 705 (1981) (Fourth Amendment allows temporary detention of the occupants of premises while police search the premises pursuant to a search warrant). Canine units are an intrinsic part of modern police work, and there is no similarity between a police canine unit and the civilians who accompanied police officers in *Wilson*.[3]

In short, there is no conflict between the decision of the court of appeals in this case and this Court's holdings in *Johnson*, *Stanford*, *Lo-Ji Sales, Inc.*, *Katz*, *Garrison*, *Horton*, and *Wilson*.

II. THE DECISION BELOW DOES NOT RESOLVE AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT ALREADY BEEN RESOLVED.

The petitioner contends that a writ should issue because the state court below has decided an important question of federal law that has not been, but should be, settled by this Court, namely, whether the use of a drug-detecting dog inside a residence constituted a "search." However, the court of appeals did not determine whether or not the dog sniff in the present case constituted a "search." Rather, that court noted that the dog's presence

[3] The petitioner seems to be arguing that the police could have brought with them a dog trained to sniff out counterfeit jeans, but not a dog trained to locate drugs or explosives. Pet. 11. It is difficult to believe that the constitutionality of the search turns upon the identity of the particular dog, and that the Fourth Amendment would permit the investigators to be accompanied by Officer Fido but not Officer Spot.

on the scene did not affect the legality of the officer's actions because he would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert. Pet. App. 9. Consequently, the decision below did not reach the question of whether a dog sniff under these circumstances constituted a "search" under the Fourth Amendment; and this Court should therefore decline to review this issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that the Court's "traditional rule" precludes a grant of certiorari when "the question presented was not pressed or passed upon [in the court] below").

The petitioner claims that this Court has left unresolved the question of whether a dog sniff can ever be a search, especially if conducted inside a residence, but this Court has, in fact, resolved that issue. The detection of contraband by a trained dog is not a search requiring a warrant under the Fourth Amendment. *See United States v. Place*, 462 U.S. 696 (1983). This Court specifically held in *Place* that a canine sniff of a traveler's luggage does not constitute a "search" under the Fourth Amendment of the United States Constitution. *Id.* at 707. The Court noted that a canine sniff is less intrusive than a "typical search" and does not result in the loss of privacy with respect to any matters other than the possession of contraband:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. [Citation omitted]. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging though the contents

> of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of information revealed by the procedure.

Place, 462 U.S. at 707.

The petitioner attempts to distinguish *Place* from this case on grounds that the dog sniff in *Place* occurred in a public locale, rather than a residence. Any such distinction is a distinction without a difference. In this case, the police were authorized to be present in the residence under the authority of the search warrant, and they merely brought along their standard investigative tools, such as the canine unit, when they arrived to execute that warrant.

A neutral and detached magistrate had already found probable cause to believe that the law was being violated in the petitioner's business premises, and had already authorized a substantial invasion of the privacy of any persons who resided there. *See Summers*, 452 U.S. at 701. Thus, a neutral magistrate rather than an officer in the field made the critical determination that the police should

be given a special authorization to thrust themselves into the privacy of the designated location, which included the petitioner's on-site residence. *See id.* at 703. Once the search warrant was issued, the petitioner had a greatly diminished expectation of privacy in his residential area.

For Fourth Amendment purposes, a "search" does not occur, even when the explicitly protected area of a residence is concerned, unless a reasonable expectation of privacy exists in the object of the challenged search. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).[4] An individual has no reasonable expectation of privacy in possessing illegal drugs. *See United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *see also United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998). Therefore, a government investigative technique, such as a dog sniff or chemical test, that discloses only the presence or absence of narcotics, and does not expose noncontraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a "search" for Fourth Amendment purposes. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Jacobsen*, 466 U.S. at 122-24; *Place*, 462 U.S. at 706-07.[5]

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[4] In this context, the term "object of the search" includes not only the items searched for but also the areas or aspects of a location that are searched. Therefore, the presence of illegal items in a home does not necessarily lessen the expectation of privacy there so as to allow it to be searched without a warrant, but rather, an investigative method that can only detect the existence of illegal items in a home, and does not intrude on any other areas or aspects of it, is not a search for Fourth Amendment purposes. *See Porter v. State*, 93 S.W.3d 342, 346 (Tex. App. – Houston [14th Dist.] 2002, pet. filed).

[5] *See also United States v. Tarazon-Silva*, 960 F.Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding that dog sniff of dryer vent of house was

(Continued on following page)

As in *Place*, the sniff in the present case revealed nothing about the room other than the presence of narcotics. It did not intrude upon any legitimate expectation of privacy, and was not a "search" under the Fourth Amendment, much less an illegal one.

Thus this Court has not left the issue of the constitutional implications of canine sniffs unresolved, and need not grant review in the present case.

The petitioner also asserts that the decision below conflicts with the decision of a federal court of appeals in *United States v. Thomas*, 757 F.2d 1359, 1366 (2nd Cir. 1985). The *Thomas* court held that the warrantless use of a drug-sniffing dog outside the door of the defendant's residence constituted a search that impermissibly intruded on the defendant's legitimate expectation of privacy. The Texas court of appeals accurately distinguished *Thomas* in its opinion in the instant case, observing that "the facts of this case are distinguishable [from *Thomas*], however, because there is evidence in the record that the officer would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert." Pet. App. 9. Moreover, as discussed above, there is

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not a search), *aff'd*, 166 F.3d 341 (5th Cir. 1998); *People v. Dunn*, 77 N.Y.2d 19 (1990), *cert. denied*, 501 U.S. 1219 (1991) (holding that canine sniff outside an apartment was not a search). A dog sniff is also not a search for purposes of applying Article I, section 9, of the Texas Constitution. *Crockett v. State*, 803 S.W.2d 308, 310 n.5 (Tex. Crim. App. 1991). By contrast, the use of a thermal imaging device to record the heat being emitted from within a home is a "search" because it can reveal information about legal activity inside the home as to which individuals have a legitimate expectation of privacy. *See Kyllo*, 121 S.Ct. at 2043-46.

no legitimate expectation or interest in "privately" possessing cocaine. This is particularly true on the facts of this case, where police were inside the petitioner's residence under the authority of a search warrant and were authorized by the warrant to search any and all areas which could contain documents. Conceivably, documents could be hidden almost anywhere on the premises.

The decision in *Thomas* does not conflict with that of the court below, and no need for this Court's review has been demonstrated.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *KYLLO V. UNITED STATES*.

As previously noted, the court of appeals found that the warrant in the present case limited the scope of the search, and because the evidence in the record reflected that the officer searched the safe for business records, as specified in the warrant and notwithstanding the dog's alert, the officer's search remained within the scope of the search warrant. Pet. App. 9-10. Accordingly, the court held that the presence of the dog did not enlarge the scope of the warrant. Pet. App. 10. It did not reach, nor was it required to reach, the determination of whether the dog's sniff constituted a "search." There was no need to reconcile the decision in this case with *Kyllo*, because it was unnecessary to determine whether the canine sniff was a constitutionally cognizable "search." This is not the case in which that question must be resolved.

In *Kyllo*, the police, while standing on a public street, used a thermal imaging device to determine if the amount of heat emanating from Kyllo's home was consistent with

the type of high-intensity lamps typically used for growing marihuana indoors. *Kyllo*, 533 U.S. at 28. This Court held that this was an unlawful search, stating:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Id. at 40.

Kyllo is distinguishable from the instant case for two reasons. First, unlike the search in *Kyllo*, the officers in this case had a search warrant authorizing the search of the interior of the petitioner's premises. Once officers obtained a search warrant permitting entry into any and all areas in which documents could be found, the petitioner no longer had a reasonable expectation of privacy in the interior of his room or any enclosures in which documents could be found.

Second, various devices employed for surveillance purposes differ in the degree that they implicate expectations of privacy. *See Place*, 462 U.S. at 706 (recognizing that a canine sniff as a relatively unintrusive method of gathering information due to its limitations in detecting only contraband); *United States v. Knotts*, 460 U.S. 276 (1983) (use of a beeper to track car's movements infringed no reasonable expectation of privacy); and *Smith v. Maryland*, 442 U.S. 735 (1979) (use of a pen register to record phone numbers dialed infringed no reasonable expectation of privacy). In *Kyllo*, the surveillance device used without a warrant was a sophisticated piece of technology that revealed information, other than the presence of contraband,

about the interior of Kyllo's home. *See Kyllo*, 533 U.S. at 38.

Here, the dog's sniff did not explore the details of the room; the sniff revealed nothing about the room other than the presence of cocaine. There is no legitimate expectation or interest in "privately" possessing cocaine. *See Jacobsen*, 466 U.S. 109; *see also Reed*, 141 F.3d at 650. Furthermore, odor occurs without assistance from the police, and smells have not traditionally been regarded as something in which a person could have a reasonable expectation of privacy. *See, e.g., Hill v. State*, 951 S.W.2d 244, 251 (Tex. App. – Houston [14th Dist.] 1997, no pet.).

The canine was simply an investigative tool, the use of which, as this Court has recognized in *Place*, is far less intrusive than a typical police search. The officers were authorized by warrant to enter the premises, and they were implicitly authorized to bring along the usual tools of their trade, such as flashlights, cameras, fingerprint equipment, and so forth. Bringing along an investigative tool during the execution of a search warrant does not convert a valid search pursuant to a search warrant into an invalid one. *See Knotts*, 460 U.S. at 284 ("Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.").

Because *Kyllo* is so readily distinguishable, it is unnecessary for this Court to grant certiorari in order to reconcile the present case with *Kyllo*.

IV. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS IN *UNITED STATES V. ROSS* AND *COOLIDGE V. NEW HAMPSHIRE*.

The petitioner complains that the court of appeals incorrectly found it reasonable for the investigating officers to believe, based upon the totality of the circumstances, that the nightstand might contain items described in the search warrant, such as "documents and records" pertaining to counterfeit merchandise, the ownership or employees of U.S. Apparel, or the existence of other witnesses with information concerning the operation of U.S. Apparel. Pet. App. 9.

This Court, in *United States v. Ross*, 456 U.S. at 820-821, held that officers may search all areas in which items specified in the warrant may be found, including areas that may be enclosed. Clearly, officers could reasonably believe that a document containing ownership information or the names, addresses or telephone numbers of contacts or employees might be stored in the nightstand.

In *Horton v. California*, this Court noted that "even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the officer's subjective state of mind." *Horton*, 496 U.S. at 138. In the present case, it was objectively reasonable for officers to believe that the nightstand in the petitioner's bedroom might contain documents pertaining to the business, in light of the facts that the bedroom was located within the business premises, counterfeit clothing was found in the residential area, and business records were found in the safe located in that residential area.

The petitioner contends that the decision of the court of appeals is in conflict with this Court's decision in *Coolidge*, 403 U.S. at 455. In *Coolidge*, this Court reiterated the holding in *Katz*, that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Coolidge*, 403 U.S. at 454-455. This Court in *Coolidge* also reiterated that the party seeking an exemption from the Fourth Amendment requirement of a search warrant must bear the burden of showing the applicability of an exception to the warrant requirement. *Id.*

In the present case, the officers had a valid search warrant and they proceeded to enter the premises of U.S. Apparel and execute the warrant. As determined by the court of appeals, the officers properly searched the areas in which business documents could be found. The officers were then justified under the "plain view" doctrine to seize the cocaine, after they reasonably looked in the safe and nightstand for business documents. *See Coolidge*, 403 U.S. at 465 ("An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character").

The opinion of the court of appeals is not in conflict with this Court's decisions in *Ross* or *Coolidge*. For this and all the foregoing reasons, this Court need not grant a writ of certiorari in order to resolve a conflict in decisions

or to resolve an undecided issue regarding the construction and application of the Fourth Amendment.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

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RONEN JACK AMIR,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment's prohibition against general exploratory search warrants is violated when peace officers bring a drug-detecting dog to participate in a search when drugs are not among the items specified for seizure in the search warrant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Hicks, 480 U.S. 321 (1987) 2, 6

Bond v. United States, 529 U.S. 334 (2000) 5, 6

Comm. v. Johnston, 530 A.2d 74 (Pa. 1987) 5

Comm. v. Martin, 626 A.2d 556 (Pa. 1993) 6

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 4

Garcia v. State, 829 S.W.2d 796 (Tex.Crim.App. 1992) 8

Johnson v. United States, 333 U.S. 10 (1948) 7, 10

Katz v. United States, 389 U.S. 347 (1967) 9

Kyllo v. United States, 533 U.S. 27 (2001) 8

Mincey v. Arizona, 437 U.S. 385 (1978) 4

Nix v. Williams, 467 U.S. 431 (1984) 1, 8

Payton v. New York, 445 U.S. 573 (1980) 4

People v. Dunn, 564 N.E.3d 1054 (N.Y. 1990) 5

Pooley v. State, 705 P.2d 1293 (Alaska App. 1985) 5

State v. Dearman, 962 P.2d 850 (Wash.App. Dist. 1, 1988) 3, 5

State v. Ortiz, 600 N.W.2d 805 (Neb. 1999) 5

State v. Pellicci, 580 A.2d 710 (N.H. 1990) 3, 5

United States v. Hendrixon, 234 F.3d 494 (11th Cir. 2000) 2

TABLE OF AUTHORITIES – Continued

Page

United States v. Jacobsen, 466 U.S. 109 (1984) 7

United States v. Karo, 468 U.S. 705 (1984) 9

United States v. Knotts, 460 U.S. 276 (1984) 3

United States v. Place, 462 U.S. 696 (1983) 6

United States v. Ross, 456 U.S. 798 (1982) 4

United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985) 4

United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988) 6

Wilson v. Layne, 526 U.S. 603 (1999) 1, 2, 3, 4

Wong Sun v. United States, 371 U.S. 471 (1963) 9

ARGUMENT

There are three compelling reasons why certiorari in this case is warranted. First, Respondent does not, because it cannot, distinguish this Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), and defuse the argument that the drug dog's presence inside his bedroom was wholly unrelated to the objectives of the intrusion authorized by the search warrant. Second, this case presents this Court with an appropriate vehicle to resolve an important and recurring federal constitutional question that has evaded review in this Court because Texas is one of few States that does not recognize the doctrine of inevitable discovery promulgated by this Court. See *Nix v. Williams*, 467 U.S. 431, 444 (1984). And third, left unchecked, the decision below presents an unacceptable risk that any police officer executing any search warrant for non-narcotics evidence can and will expand the scope of the search into a search for narcotics by unilaterally adding a drug-detecting dog to the raid team without the intervention of a neutral and detached magistrate.

I.

In *Wilson v. Layne*, 526 U.S. at 611, this Court held that "the Fourth Amendment does require that police actions in execution of the warrant be related to the objectives of the authorized intrusion." Respondent cannot argue that the drug dog is related to the objectives of the search for counterfeit clothing and business records and instead seeks to distinguish *Wilson* because it is a civil matter involving a monetary suit for damages and not a criminal case involving the application of the exclusionary rule. *Resp. Brf.* at 10. This overly simplistic view of *Wilson* turns a blind eye to the fact that this principle that police

actions in execution of the warrant be related to the objectives of the authorized intrusion is drawn from this Court's decision in *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Respondent's contention that *Wilson* is inapposite because it is a civil case has also been rejected by at least one Circuit. See *United States v. Hendrixon*, 234 F.3d 494, 496-497 (11th Cir. 2000) (finding Fourth Amendment violation in criminal case where police violated rule in *Wilson* by permitting third party into residence during execution of search warrant).

In *Wilson*, this Court also held that "it is a violation of the Fourth Amendment for police to bring members of the media or *other third parties* into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." (emphasis added). Respondent seeks to justify the drug dog's presence inside Petitioner's bedroom by claiming that the dog was not a "third party" present during execution of the search warrant in the face of the contrary holding in *Wilson* because the dog "was a part of the Houston Police Department, and was authorized to be present . . . as would any other member of the police force." *Resp. Brf.* at 10. Respondent goes on to argue that "[c]anine units are an intrinsic part of modern police work" who "routinely assist police officers in a wide variety of tasks." *Id.* Aside from its failure to develop this claim in either the trial court or the court of appeals, Respondent also fails to acknowledge that when the dog's handler was asked by the trial judge why the dog was present during the search, he replied, "*I have no idea, Your Honor.*" *Pet. App.* at 8. (emphasis added). Respondent also claims that "there is no similarity between a police canine unit and the civilians who accompanied police officers in *Wilson*."

Resp. Brf. at 11. To the extent that the civilians in *Wilson* were unable to detect the presence of cocaine in a closed container at the searched premises on the strength of their sense enhancement,[1] this argument is utterly devoid of merit. Because the drug dog in this case was no more related to the objectives of the intrusion authorized by the magistrate than the civilians in *Wilson*, this Court should grant certiorari to determine whether the drug dog's presence without any prior judicial authorization violated the Fourth Amendment.

Respondent attempts to amplify this claim by contending that the "canine was simply an investigative tool" no different from a flashlight, camera, or the like citing this Court's decision in *United States v. Knotts*, 460 U.S. 276 (1984). This claim ignores the holding in *Knotts* that the installation of a beeper to track the defendant's vehicle was not a Fourth Amendment violation because, "A person traveling in an automobile on *public thoroughfares* has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. (emphasis added). Respondent's argument mistakenly commingles the reasonable and well recognized level of privacy this Court has long held one enjoys in their home with the diminished expectation of privacy one expects in a public setting. It strains credulity for Respondent to claim that the difference

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[1] See *State v. Dearman*, 962 P.2d 850, 853 (Wash.App. Dist. 1, 1988) ("Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home."); *State v. Pellicci*, 580 A.2d 710, 716 (N.H. 1990) (canine sniff is a search under state constitution because dog discerned something not otherwise apparent to officers through their own senses).

between a dog sniff in the bedroom of Petitioner's residence and a dog sniff in a public place is "a distinction without a difference," *Resp. Brf.* at 13, when principled respect for the sanctity of the home has long animated this Court's Fourth Amendment jurisprudence. See e.g., *Wilson v. Layne*, 526 U.S. at 610 ("the Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"); *Payton v. New York*, 445 U.S. 573, 601 (1980) (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity of the criminal law"). Moreover, Respondent does not, because it cannot, reconcile its myopic view on dog sniffs in non-public places with the contrary views of Professor LaFave,[2] the three dissenting judges on the Court of Criminal Appeals,[3] the Second Circuit Court of Appeals,[4] or the Supreme Courts of

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[2] See *Pet. App.* at 16 n. 7.

[3] See *Pet. App.* at 4-5.

[4] See *United States v. Thomas*, 757 F.2d 1359, 1367 (2nd Cir. 1985). Respondent argues that the court of appeals "accurately distinguished *Thomas* . . . because there is evidence in the record that *the officer would have searched the safe for business records* . . . regardless of the narcotics dog's alert." *Resp. Brf.* at 15 (emphasis added). Respondent, however, ignores the fact that this record is silent as to whether police would have searched the night stand for business records, see *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (*plurality opinion*), or that it was objectively reasonable for police to believe that business records could have even fit within the night stand. See *United States v. Ross*, 456 U.S. 798, 824 (1982).

Nebraska,[5] Pennsylvania,[6] New York,[7] New Hampshire,[8] and appellate courts in Alaska[9] and Washington.[10]

Respondent's argument that the drug dog's presence and ultimate detection of the cocaine inside Petitioner's bedroom night stand neither implicated nor violated the Fourth Amendment also turns a blind eye to *Bond v. United States*, 529 U.S. 334, 338 (2000), where this Court held that the defendant had a legitimate expectation of privacy that his bag – placed on the luggage rack of a bus – would not be felt in an exploratory manner even if the general public touched it. Petitioner's situation is more compelling; he certainly did not expect the intrusion into his bedroom of a drug sniffing dog when police made no effort to convince a neutral and detached magistrate that there was probable cause that drugs could be found anywhere in the premises to be searched, let alone in his bedroom night stand. *Bond* also makes it clear that physical inspection is more intrusive than a purely visual inspection and the sensory enhancement the dog brought

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[5] See *State v. Ortiz*, 600 N.W.2d 805, 815 (Neb. 1999) (canine sniff a search under state constitution).

[6] See *Comm. v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (same).

[7] See *People v. Dunn*, 564 N.E.3d 1054, 1058 (N.Y. 1990) (canine sniff in apartment hallway a search under state constitution).

[8] See *State v. Pellicci*, 580 A.2d 710, 716 (N.H. 1990) (canine sniff is a search under state constitution because dog discerned something not otherwise apparent to officers through their own senses).

[9] See *Pooley v. State*, 705 P.2d 1293, 1310-1311 (Alaska App. 1985) (same).

[10] See *State v. Dearman*, 962 P.2d 850, 853 (Wash.App. Dist. 1, 1988) ("Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to see through the walls of the home.").

to bear was not a purely visual inspection. Indeed, the drug dog did not merely sniff the night stand but actually opened it, the epitome of physical inspection violative of the Fourth Amendment denounced in *Bond*.[11]

Only by trivializing the dog's presence in Petitioner's bedroom can Respondent avoid the core issue before this Court: whether the dog's very presence violated the Fourth Amendment's prohibition against general exploratory searches. Accordingly, this Court should grant certiorari to resolve the fundamental question of whether the Fourth Amendment's guarantee of personal security and privacy in one's home, indeed, in one's bedroom, must yield to the unilateral decision of police to introduce a sensory enhancement element that constitutes a separate search without the intervention of a neutral and detached magistrate.[12] See *Comm. v. Martin*, 626 A.2d 556, 561 (Pa. 1993)

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[11] Respondent's claim that the cocaine was admissible under the plain view exception once the drug dog opened up the night stand, *Resp. Brf.* at 9, will not support the weight rested upon it. This Court has made it clear that even if police are inside a suspect's home on the basis of a legal warrant, they cannot search or seize objects in plain view that are unrelated to the suspected crime that is the subject of the warrant without probable cause as to those items. *Arizona v. Hicks*, 480 U.S. 321, 326-328 (1987).

[12] Respondent's argument that this Court's decision in *United States v. Place*, 462 U.S. 696 (1983), resolved for all time the question of whether a dog sniff in a non-public place can ever be a search proves too much. *Resp. Brf.* at 12-13. Aside from the fact that three Justices felt that the majority's discussion of the use of drug detecting dogs was *dicta*, *id.* at 719-720, at least one Circuit has cautioned that, "*Place* obviously did not sanction the indiscriminate blanket use of trained dogs in all contexts." *United States v. Whitehead*, 849 F.2d 849, 857 (4th Cir. 1988).

("A free society cannot remain free if police may use drug detection dogs without restraint.").

Finally, the cornerstone of Respondent's defense of the judgment below, the oft-repeated refrain that Petitioner had no reasonable expectation of privacy in possessing the cocaine in his bedroom night stand based upon its myopic interpretation of *United States v. Jacobsen*, 466 U.S. 109, 123 (1984), *Resp. Brf.* at 14, 16, 18, collapses of its own weight. A careful reading of *Jacobsen* reveals this Court did not say anywhere near that which Respondent attributes to it. This Court merely held that under the facts of that case – where the contraband had already been exposed to the public – testing it to determine if it was cocaine did not violate a reasonable expectation of privacy. But where, as here, police are only able to be in a position to test the substance because of conduct that violates a reasonable expectation of privacy, such as the reasonable expectation of privacy that Petitioner had in the night stand, then *Jacobsen* does not insulate that conduct from condemnation as a violation of the Fourth Amendment. As this Court noted some sixty-five years ago in *Johnson v. United States*, 333 U.S. 10, 14 (1948) (emphasis added):

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and *the law allows such crime to be reached on proper showing.* The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security. *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*

II.

This case also presents this Court with the appropriate vehicle to resolve an important and recurring federal constitutional question that has and will likely continue to evade review in this Court[13] because Texas is one of few States that does not recognize this Court's teachings as to the doctrine of inevitable discovery. See *Garcia v. State*, 829 S.W.2d 796, 798 (Tex.Crim.App. 1992) ("Thus, to the extent that Texas law provides an independent basis for the exclusion of evidence, the inevitable discovery exception approved by the United States Supreme Court is simply irrelevant."). In virtually any other State and in all of the federal Circuits, see *Nix v. Williams*, 467 U.S. at 440 n. 2 ("the vast majority of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule"), the fact situation presented in this case would not warrant certiorari because prosecutors could argue that the cocaine in the night stand would have been inevitably discovered regardless of the dog's sniff. The absence of inevitable discovery in Texas and the Houston Police Department's exploitation of "the power of technology to shrink the realm of guaranteed privacy," *Kyllo v. United States*, 533 U.S. 27, 33 (2001), to perform an end run around the Fourth Amendment's prohibition against general exploratory searches presents this Court with the appropriate vehicle to resolve a cutting-edge

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[13] Of course, another reason why this exact question has never come before this Court is that virtually all police and prosecutors apparently recognize that the Fourth Amendment's prohibition against general exploratory searches would not permit a drug-sniffing dog to participate in a search when drugs are not among the items specified for seizure in the search warrant.

constitutional question while reaffirming its deeply-felt belief that, "Those suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." *United States v. Karo*, 468 U.S. 705, 717 (1984).

III.

Ultimately, Respondent's attempt at defending the judgment below boils down to its jerry-rigged contention that the fundamental right to privacy that we enjoy in the bedrooms of our homes is a legal fiction whenever a drug sniffing dog is unilaterally introduced into the mix by law enforcement without any prior judicial authorization. Left unchecked, the decision below presents a constitutionally unacceptable risk that any police officer executing any non-narcotics search warrant can and will transform it into a general exploratory search warrant for narcotics in violation of this Court's myriad decisions to the contrary. See e.g., *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963) (Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . "); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes."). It is of little moment that the court of appeals' decision sanctioning this scenario was unpublished when the Court of Criminal Appeals' decision denying review over the vigorous dissent of three judges was not. The holding in this case is of precedential value to law enforcement agencies throughout Texas even if Respondent is correct that this decision is not found in the pages of Southwestern Reporter.

The decision below is a new and unwarranted exception to the warrant requirement that stands this Court's holding in *Johnson* on its head and does not find support in this Court's Fourth Amendment jurisprudence. It is a dangerous position that can only be addressed by this Court granting this petition for certiorari.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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